

United States

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Circuit Court of Appeals

For the Ninth Circuit.

R. J. DUDLEY,

Appellant,

vs.

HENRY A. SCANDRETT, WALTER J. CUM-
MINGS, and GEORGE I. HAIGHT, Trustees
of Chicago, Milwaukee, St. Paul and Pacific
Railroad Company, a corporation, and CHI-
CAGO, MILWAUKEE, ST. PAUL AND PA-
CIFIC RAILROAD COMPANY, a corpora-
tion,

Appellees.

Transcript of Record


Upon Appeal from the District Court of the United
States for the Western District of Washington,
Southern Division

FILED

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PAUL P. O'BRIEN,

CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States for the
Western District of Washington, Southern
Division,

No. 8594

R. J. DUDLEY,

Plaintiff,

vs.

HENRY A. SCANDRETT, WALTER J. CUM-
MINGS, and GEORGE I. HAIGHT, Trustees
of Chicago, Milwaukee, St. Paul and Pacific
Railroad Company, a corporation, and CHI-
CAGO, MILWAUKEE, ST. PAUL AND PA-
CIFIC RAILROAD COMPANY, a corpora-
tion,

Defendants.

COMPLAINT

Plaintiff complains of defendants and for cause
of action alleges:

I.

That the above named defendant Chicago, Mil-
waukee, St. Paul and Pacific Railroad Company
was and is a corporation duly organized and exist-
ing under the laws of the State of Wisconsin en-
gaged in the operation of a common carrier by rail-
road in interstate commerce; that the above named
defendants, Henry A. Scandrett, Walter J. Cum-
mings and George I. Haight, were duly appointed
trustees of the said defendant Chicago, Milwaukee,

St. Paul and Pacific Railroad Company by order duly made and entered about the 17th day of October, 1935, in the District Court of the United States for the Northern District of Illinois, Eastern Division, in certain proceedings therein pending entitled "In proceedings for the re-organization of a railroad" "In the Matter of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, debtor" which was with reference to the re-organization of said railroad company under the laws of the United States and that thereafter and effective as of January 1, 1936, and at all of the times since said date said de- [1*] fendants have been and now are the duly appointed, qualified and acting trustees of said railroad company in charge of and operating all the railroad properties, steam and electric railroad systems and lines, trains, cars, locomotives, tracks and equipment of said railroad company as a common carrier of freight and passengers for hire under and by virtue of their appointment as aforesaid and pursuant to the orders of the aforesaid court and laws governing same.

II.

That on or about the 5th day of October, 1936, plaintiff was in the employ of defendants for hire as a train baggageman and on such date was engaged in the performance of his duties as such in a certain baggage car of defendants' at the station of Tacoma, Washington, which car was a part of train No. 16

*Page numbering appearing at foot of page of original certified Transcript of Record.

of defendants' and destined to Chicago, Illinois, and that plaintiff in the direct prosecution of his duties was arranging space in said baggage car for the reception of train baggage and express matter that was in the process of being shipped and transported in interstate commerce from the State of Washington and into and across the State of Idaho to other States of the United States; that defendants had placed in said baggage car prior to plaintiff reporting for work a certain "smoke jack" which was constructed of galvanized iron one end of which was approximately four feet square and attached to this end was a smoke stack circular in shape about eight inches in diameter and about eight feet long on the top of which was a cross piece of the same material and dimensions attached thereto; that said smoke jack was lying lengthwise in the end of said baggage car and underneath the same was piled other packages of company material and merchandise; that circling the stack of said smoke jack were two flat galvanized iron plates which were loose upon said stack and extended out from the surface thereof a distance of [2] about ten inches; that the edges of same were sharp and likely to cut anyone handling the same, which fact was known to defendants or could have been known by the exercise of reasonable care, but was unknown to plaintiff; that plaintiff in the performance of his duties raised said smoke jack so that the stack thereof was extending upward in said baggage car in the end thereof and

was in the act of moving said packages as aforesaid from underneath the same when said smoke jack started to fall and plaintiff in placing his arm against said jack to keep the same from falling through the negligence of the defendants hereinafter stated came in contact with the sharp edges of said circular galvanized plates and by reason thereof was severely and permanently injured by being cut in the left arm on the wrist bone injuring such bone causing the same to bleed profusely and thereby infecting plaintiff's blood causing systemic blood poisoning throughout his entire system by being infected with what is known as streptococci or other infectious germs, all of which caused a severe arthritic condition of the vertebra of plaintiff's spinal column and plaintiff's right and left arms and the joints of his legs and knees, all of said injuries being permanent and rendering plaintiff incapable of performing any work whatsoever except plaintiff attempted to work between about the 26th day of February and about the 8th day of May, 1937, but was unable to perform the full duties of his work and was compelled to leave said work on or about the date last aforesaid and ever since the receipt of said injuries plaintiff has been and is now suffering continuous and intense pain and mental anguish.

III.

That the aforesaid injuries to plaintiff were caused proximately by the negligence of the defend-

ants in the following particulars: (a) defendants carelessly and negligently failed and neglected to wrap and protect the aforesaid sharp [3] edges of said galvanized circular plates extending from the stack of said smoke jack by covering the same with burlap or other material so that plaintiff and defendants' other employes handling said smoke jack would not come in contact with said sharp edges thereof, which wrapping of said sharp edges of circular plates on smoke jacks when shipping or about to ship same was the custom and practice adopted by and known to defendants; (b) defendants carelessly and negligently failed and neglected to warn plaintiff of the aforesaid dangerous and sharp edges of said galvanized plates on said smoke jack prior to the time that plaintiff was required in the performance of his duties to handle said smoke jack.

IV.

That prior to the receipt of the aforesaid injuries plaintiff was capable of performing his full duties as train baggageman and at the time of said injuries was of the age of about 50 years and had a life in expectancy of 20.91 years and was earning and capable of continuing to earn the sum of at least \$190.00 per month or \$2280.00 per year, and that since the receipt of said injuries he has been unable to perform any work or labor except as hereinbefore stated, and has lost his time and wages to the date hereof in the sum of \$3420.00, and that

plaintiff will always be prevented from performing his usual duties of a train baggageman, or any other remunerative employment, and that by reason of the aforesaid injuries caused by the negligence of the defendants aforesaid, the pain and suffering endured and to be endured by plaintiff and the impairment of plaintiff's earning capacity plaintiff has been generally damaged in the sum of \$35000.00.

V.

That the plaintiff herein is and when this action was commenced was a citizen and resident of the State of Washington; [4] that the defendants herein are and when this action was commenced were citizens and residents of the State of Illinois and the State of Wisconsin respectively and there is in this action a controversy which is wholly between citizens of different States which can be fully determined as between them; that the above entitled action is of a civil nature and that the matter and amount in controversy in said action exclusive of interests and costs exceeds the sum of \$3000.00.

Wherefore plaintiff demands judgment against the defendants for the sum of \$3420.00 special damages and general damages in the sum of \$35000.00, and his costs and disbursements herein.

(Sgd) FRANK C. HANLEY

Attorney for plaintiff

State of Oregon

County of Multnomah—ss.

I, R. J. Dudley, being first duly sworn, say that I am the plaintiff in the within entitled action and that the foregoing Complaint is true as I verily believe.

(Sgd) R. J. DUDLEY

Subscribed and sworn to before me this 12th day of April, 1938.

[Seal]

(Sgf) F. C. HANLEY

Notary Public for Oregon

My Commission Expires 4/16/40

[Copy Endorsed]: Filed May 21, 1938. [5]

[Title of District Court and Cause.]

ANSWER

The defendants, answering the complaint of the plaintiff,

I.

Admit the allegations contained in paragraph I thereof.

II.

Admit that on the 5th day of October, 1936, plaintiff was in the employ of defendants as train baggageman, and was engaged to perform his duties as such in a certain baggage car of the defendants at the station of Tacoma, Washington, which car was

a part of train No. 16 of defendants' railroad destined to Chicago, Illinois; and admit that plaintiff was in said baggage car as baggageman while said car was standing still on the tracks of defendants at the station of Tacoma, Washington. Admit that defendants had placed in the end of said baggage car prior to plaintiff's reporting for work therein, a certain "smoke jack", and admit that said smoke jack was lying in the end of said baggage car. Admit that plaintiff raised said smoke jack and set it up in said baggage car against the side or end thereof, and admit that said smoke jack started to fall after it had been set up by the plaintiff [6] as aforesaid, and admit that plaintiff's arm or wrist came in contact with said smoke stack after the same started to slip or fall, but deny each and every other matter, allegation and thing contained in paragraph II of said complaint.

III.

Deny each and every matter, allegation and thing contained in paragraph III of said complaint, and deny that the plaintiff sustained or received any injury, and deny that the plaintiff suffered any damage whatsoever, by or on account of any act or omission of these defendants, or any of them.

IV.

Admit that plaintiff was capable of performing his full duties as train baggageman, but deny each and every other allegation, matter and thing con-

tained in paragraph IV of said complaint, and deny that he lost time and wages in the amount of \$3420.00, or in any sum whatsoever, by or on account of any act of these defendants, or any of them, and deny that he has been damaged in the sum of \$35,000.00, or in any sum whatsoever, by or on account of any negligence of these defendants, or any of them, and deny that the plaintiff has suffered pain, or that he will suffer in the future any pain or any impairment of earning capacity by or on account of any act or omission of these defendants, or any of them.

V.

Admit the allegations contained in paragraph V of said complaint.

Further Answering the Complaint of the plaintiff, and as a First Affirmative Defense thereto, these defendants allege:

I.

That the plaintiff was an experienced baggageman, and [7] had performed the service of baggageman in the employ of the defendants in its baggage cars on and over the lines of the defendant railroad company for more than twenty years prior to October 5, 1936. That the baggage car referred to in the complaint, when plaintiff entered it on October 5th for the performance of his duties as baggageman in connection with the operation of the trains alleged in the complaint, was well lighted and he saw and

could see and did see said smoke stack lying upon the floor in the end of said baggage car, and that no part of said smoke stack was concealed from the view and observation of the plaintiff; and that if he received or sustained any injury by coming in contact with any portion of said smoke stack, that such portion thereof, and all parts thereof, were plain, open and obvious and could have been seen, and the danger of coming in contact therewith was known and fully appreciated, and open and apparent to the plaintiff. That any risk or danger of coming in contact with any portion of said smoke stack while it was in said car was fully known, observed and appreciated, and the risk and danger thereof assumed by the plaintiff in the course of his employment. That said smoke stack was company material for use by the defendants, made at Tacoma, and was placed in said car to be transported and taken from Tacoma as company material to be put upon and installed on one of the cabooses of the company at Spokane, Washington.

For a Further and Second Affirmative Defense to the complaint, these defendants allege:

I.

That the act of the plaintiff in taking up said smoke stack from the place where it was lying on the floor in the [8] end of said car and standing it up against the side or end of said car, was the sole proximate cause of the accident and of the injury

and damage, if any, to the plaintiff resulting therefrom; and that if the plaintiff had left said smoke stack on the floor of the car where it had been placed by the defendant the accident would not have occurred and the plaintiff would not have sustained the injury or the damage resulting therefrom, if any, as alleged in the complaint, or at all.

For a Further and Third Affirmative Defense to the complaint, these defendants allege:

I.

That the accident referred to in the complaint and the injury, if any, resulting to the plaintiff therefrom, and the damage, if any, received and sustained by the plaintiff on account of his coming in contact with said smoke stack, if he did come in contact with the same as alleged in the complaint, or at all, were due to and occasioned solely by the carelessness and negligence of the plaintiff, and that if the plaintiff had used reasonable care and caution in handling said smoke stack and placing it up against the side or end of said car, the accident would not have occurred. That the accident and the injury, if any, resulting therefrom to the plaintiff were occasioned and caused solely by the act of the plaintiff in taking said smoke stack and removing it from a safe place and putting it into the dangerous place and in failing to use due care in the performance of his duty after he had so removed said smoke jack and so placed it, as aforesaid. That

there was no movement of said car whatsoever during the times above referred to, and there was no act whatsoever of the defendants that caused or contributed to the falling or slipping [9] of said smoke stack as alleged in the complaint, or at all; and that the accident and injury therefrom, if any, were caused solely and proximately by the acts of the plaintiff herein before alleged and not otherwise.

Wherefore, defendants having fully answered pray that plaintiff recover nothing by this action, and that said action be dismissed and the said defendants have and recover from plaintiff judgment for their costs and disbursements herein.

(Sgd) A. N. WHITLOCK

(Sgd) THOS. H. MAGUIRE

(Sgd) A. J. LAUGHON

608 White Bldg., Seattle, Wn.

(Sgd) ROBERT B. ABEL

Perkins, Bldg., Tacoma, Wn.

Attorneys for defendants.

State of Washington

County of King—ss.

I, A. J. Laughon, being first duly sworn, depose and say: I am one of the attorneys for the defendants in the above entitled action, and am authorized to make this verification for and on behalf of said defendants. That I am familiar with the facts of

the case, have read the foregoing answer, know the contents thereof and believe the same to be true.

(Sgd) A. J. LAUGHON

Subscribed and sworn to before me this 19 day of July, 1938.

(Sgd) M. C. MUMFORD

Notary Public in and for the State of Washington, residing at Seattle therein.

[Copy Endorsed]: Filed July 20, 1938. [10]

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 8594

R. J. DUDLEY,

Plaintiff,

vs.

HENRY A. SCANDRETT, WALTER J. CUMMINGS, and GEORGE I. HAIGHT, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, and CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, a corporation,

Defendants.

JUDGMENT OF DISMISSAL

The above entitled cause of action coming on for trial on the 1st day of August, 1939, before a jury,

and the plaintiff appearing in court and being represented by his attorney, Frank C. Hanley, and the defendants being represented by their attorneys of record, A. J. Laughon and Robert B. Abel, and the jury having been duly empaneled, and plaintiff having presented his evidence, at the conclusion of which, the defendants having moved the court for an involuntary dismissal on the ground that upon the facts and the law the plaintiff had shown no right to relief, and after argument thereon, the court having granted said motion for involuntary dismissal, now therefore, it is,

Ordered, Adjudged, and Decreed, that the above entitled cause of action, by and between R. J. Dudley, plaintiff, and Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, and Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, defendants, be and [13] the same is hereby dismissed, and the defendants awarded their costs to be taxed.

Done in open court this 8 day of August, 1939.

(Sgd) LEON R. YANKWICH

Judge.

Presented by:

(Sgd) ROBERT B. ABEL

Of Attorneys for Defendants.

Approved as to form:

(Sgd) FRANK C. HANLEY

Attorney for Plaintiff.

[Copy Endorsed]: Filed Aug. 8, 1939. [14]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that R. J. Dudley, plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment of the District Court of the United States for the Western District of Washington, Southern Division, entered in this cause in favor of the defendants dismissing the within action, on the 8th day of August, 1939.

(Sgd) FRANK C. HANLEY

Attorney for plaintiff

407 Yeon Building

Portland, Oregon

[Copy Endorsed]: Filed Nov. 3, 1939. [15]

[Title of District Court and Cause.]

* * * * *

STATEMENT OF FACTS

* * * * *

[16]

R. J. DUDLEY,

The plaintiff herein, having been first duly sworn, testified as follows:

Direct Examination

(By Mr. Hanley)

Q. What is your name, please?

A. Raymond J. Dudley.

(Testimony of R. J. Dudley.)

Q. You are the plaintiff in this action?

A. Yes, sir.

Q. Were you ever in the employ of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company?

A. Yes.

Q. When did you enter their employ?

A. August 4, 1909.

Q. How long did you continue in the employ of the Railway Company?

A. Until May, I think it was around about the 8th or 10th of May?

Q. 19——? A. 1936 or 1937.

Q. What were you first employed as by the Railway Company?

A. As a brakeman, switchman rather.

Q. Where were you employed, Mr. Dudley?

A. In Malden, Washington.

Q. And then, were you ever employed anywhere else on the Railroad Company?

A. I was employed as a brakeman and train baggageman.

Q. From where and to where?

A. Between Malden and Avery, Idaho and between Malden and Tacoma, Washington and between Tacoma and Spokane, and then [22] on some of the branch lines.

Q. How long did you work as a brakeman?

A. About two years, in 1910 and 1911, and then as baggageman for probably about ten or twelve

(Testimony of R. J. Dudley.)

years and then as brakeman, five or six years and the rest of the time as train baggageman.

Q. How long had you been operating as a train baggageman?

A. Probably about twenty years as baggageman and the rest of the time as brakeman and switchman.

Q. In the year 1936 what was your occupation?

A. I was train baggageman.

Q. What was your run?

A. Between Tacoma and Spokane.

Q. Where did you reside at that time, Mr. Dudley?

A. At R. F. D. No. 1, Auburn.

Q. Was Tacoma your lay over, you quit your train and laid over here?

A. It is the terminal, yes.

Q. Where did you run to?

A. Tacoma to Spokane.

Q. And how many trips did you make a month, about?

A. A thirty day month, fifteen; a thirty-one day month, sixteen.

Q. That would be round trips?

A. No, that would be single trips.

Q. Each way?

A. About seven and a half average round trips.

Q. What were you doing in October, 1936?

A. Train baggageman.

(Testimony of R. J. Dudley.)

Q. Were you ever injured while in the employ of the Company? A. No. [23]

Q. You mean before October, 1936?

A. No.

Q. Have you suffered any injuries while in the employ of the Company? A. Yes.

Q. When was that? A. October 5, 1936.

Q. What were you doing on that day?

A. I was train baggageman.

Q. Do you know what train you were working on?

A. On train No. 16 between Tacoma and Spokane.

Q. Where did that train operate to? What was the final destination of the train?

A. Chicago.

Q. Did that train and equipment go through from Tacoma, Washington to Chicago, Illinois?

A. Yes.

Q. What kind of a train was it?

A. Passenger train, first class train.

Q. How many cars was the train made up of, if you know?

A. Approximately fourteen they operate nearly every day; I would say fourteen cars.

Q. Was there a baggage car on the front end of the train?

A. The baggage car was on the rear of the train at Tacoma, from Tacoma to Seattle.

(Testimony of R. J. Dudley.)

Q. It was carried on the rear of the train?

A. To Seattle.

Q. What time on October 5, 1936 did you report for work? A. Seven thirty.

Q. What time? A. M. or P. M.? [24]

A. P. M.

Q. What time was the train due to leave Tacoma? A. Eight o'clock.

Q. Why did you report for duty at 7:30?

A. We have to be on duty at 7:30, thirty minutes before leaving time.

Q. Why are you there thirty minutes before leaving time?

A. For the purpose of receiving baggage and Company material.

Q. Your working conditions required you to be there at that time? A. Yes.

Q. What happened then when you reported for duty?

A. I started to work immediately.

Q. What did you do when you got down to the station?

A. I went into the car and started getting the car arranged for receiving baggage.

Q. When you say you entered the car, you mean the baggage car? A. Yes.

Q. Through what door did you enter the car?

A. Through the end door.

(Testimony of R. J. Dudley.)

Q. Was the car combined to any other purpose except to your purpose and the purpose of transportation of train baggage? A. Yes.

Q. Was there anything else in the car?

A. Express was carried in the car, yes.

Q. A part of the car was allotted to express?

A. Yes, about forty-two feet.

Q. How long is the car?

A. Seventy-two feet.

Q. Then about thirty feet was allotted to you?

[25]

A. Yes, to me as train baggageman, thirty feet.

Q. That was on one end of the car?

A. Yes.

Q. Was there a door in that thirty feet of the car that you had? A. Yes.

Q. Was there a door on both sides of the car?

A. Yes.

Q. How wide was that door?

A. Five and a half or six feet.

Q. From the door back to the end of the car is how far?

A. About nine feet from the end of the door to the end of the car.

Q. That is when the door is open?

A. Yes, when the door is open.

Q. You mean the door proper or in the opening of the door?

A. When the door is slid back it is probably about nine feet.

(Testimony of R. J. Dudley.)

Q. From the end of the door after it is slid back? A. To the end of the car.

Q. Is there any guards on the interior of the car covering the door? A. Yes.

Q. What do they consist of?

A. Some kind of a metal, steel metal construction shaped kind of round—kind of round.

Q. That is to protect the door from baggage going against the door? A. Yes.

Q. In other words, so you always have free opening of the door at all times whether baggage is up against the door or not? [26] A. Yes.

Q. How is the interior of the car lined?

A. It is painted a dark gray, kind of a dark aluminum color.

Q. It is steel plate lined? A. Yes.

Q. And you say it is a dark aluminum color?

A. Yes.

Q. Is that the color of the entire interior of the baggage car? A. Yes.

Q. What are the lighting facilities of the baggage car?

A. They have lights on the ceiling and one light over the door.

Q. What is the wattage of these lights, the globe wattage?

A. I think they are twenty-five.

Q. How many of them are in the car proper?

A. In the entire car there is about eight through

(Testimony of R. J. Dudley.)

the center and one over the door; four doors, there would be twelve lights.

Q. How high is the interior of the car?

A. About nine feet.

Q. And these lights, the eight lights are up in the center of the car?

A. Right in the center, excepting the ones over the doors.

Q. Now, when you reported for work, was it dark or light; that is, outside?

A. It was dark.

Q. At 7:30? A. Yes.

The Court: What time of the year was it?

A. October 5th.

Mr. Hanley: Q. Was there any lighting on the [27] platform outside, on the depot? A. Yes.

Q. Some lighting there? A. Yes.

Q. The depot, where is that located? That is in the union terminal, is it?

A. No, 25th and A, I think.

Q. 25th and A Streets here in Tacoma?

A. Yes.

Q. That is just a small station? A. Yes.

Q. Was this train standing at that station in Tacoma? A. Yes.

Q. Now, when you got into the baggage car, just tell the jury what, if anything, was piled in front of the door of the car?

A. There was some heavy boxes, a few sacks, gunny sacks with some kind of material in, a

(Testimony of R. J. Dudley.)

smoke-jack and other material I could not describe now.

Q. Were they in the doorway or what part of the car?

A. Some in the doorway and some inside of the car, alongside of the smoke-jack.

Q. Was that the station side that you received the baggage from?

A. I received it from the station side, yes.

Q. What, if anything, did you have to do with this baggage?

A. I had to place it in order; place it so in the car in order that I could receive more baggage.

Q. Was this Company material? A. Yes.

[28]

Q. How do you know that?

A. Well, we write it up as such when we made a report of it.

The Court: Mr. Dudley, tell the jury more definitely which of the material was where; in other words, where was this smoke-jack with reference to the other material that you say you had to pick up?

A. It was, some of the boxes and some material was in the door, the door was open, and the jack was alongside of the door.

Q. On what side?

A. On the station side; on the side that the station is on.

(Testimony of R. J. Dudley.)

Q. Was that to your left or the right of your door?

A. It was to the right of the door.

Mr. Hanley: Q. In what direction do the tracks run there; north and south or east and west?

A. North and south, I would say.

Q. This was to the north? A. Yes.

Q. All right; the sacks were where? They were more towards the front?

A. More towards the back.

Q. Was the jack right flush with the wall?

A. Yes.

Q. Right against the wall? A. Yes.

Q. On the floor right next to the wall?

A. It was probably not against the wall but right near the wall.

Q. And the sacks were in front of that?

A. Yes.

Q. Was the jack protruding in a manner so as to obstruct the [29] doorway?

A. That was clear of the doorway.

Mr. Hanley: Q. How far back from the opening of the doorway was the closest end of the jack?

A. Probably about two feet.

Q. And then, toward the doorway how many packages or bundles or boxes of baggage or company material was there located there?

A. Between the door and the jack?

Q. Between the door and in front of the door?

(Testimony of R. J. Dudley.)

A. At the foot of the door I would say there was about eight or ten heavy boxes.

Q. By "heavy boxes", what do you mean?

A. They were something, I could not tell what was inside of them. They were boxes, some of them three feet high and probably eighteen inches wide, and there was some of them two feet high and probably only a foot wide and they were of different size.

Q. That blocked the doorway? A. Yes.

Q. Going back, was there any material between the doorway and the back end? A. Yes.

Q. How many packages there?

A. I would say ten.

Q. From there on and alongside of the jack were there any packages?

A. Yes, small packages.

Q. Where were they?

A. Under the jack and around the jack. [30]

Q. Under the stack part of the jack?

A. Yes.

Q. There were some under the stack part of the jack? A. Yes.

Q. Was there any under the other end of the smoke-jack? A. There might have been.

Q. Can you give an estimate of the number of packages or bundles located in that vicinity?

A. I would say about twelve bundles.

Q. What did you do with reference to these packages, all of them, I mean?

(Testimony of R. J. Dudley.)

A. I was picking them up and looking at them, looking at the destination and placing them in the car where I could find them easily.

Q. What packages did you first touch when you first went to work on them?

A. What packages did I first touch to move them?

Q. Yes? A. I started to move some boxes.

Q. Where were these boxes located?

A. In front of the car door.

Q. Where did you move them to?

A. On the opposite side of the car.

Q. Out of the doorway? A. Yes.

Q. Then, what did you do?

A. I was moving some of the packages around the smoke-jack.

Q. Where did you place those?

A. I placed them in different parts of the car where I knew they would be. [31]

Q. What did you do next?

A. I raised the jack.

Q. What do you mean when you say you raised the jack?

A. The jack—there was some packages underneath the smoke-jack and I raised it to get them out.

Q. Describe the smoke-jack to the jury?

A. It was about seven feet long, and there was a loose disk on the stove pipe part. There was a

(Testimony of R. J. Dudley.)

flange probably eighteen or twenty inches across on the bottom that was loose just below the disk on the pipe.

Q. Mr. Dudley, that is, as I understand, this part of the smoke-jack, is that correct (indicating on smoke-jack)?

A. Yes.

Mr. Hanley: Is there any objection to my using this smoke-jack to illustrate it to the jury?

Mr. Laughon: That is what we have it here for. May I make a statement about it?

Mr. Hanley: Yes.

Mr. Laughon: We brought what we had available. I make this statement to show the difference between this smoke-jack and the one being shipped at that time. The jack lying in the car was longer than this jack here. It was going to Spokane to be put on a caboose over there. It was cut down the length of this piece shown here (indicating), it was cut down there and sent out as Company material. In all other respects, the top and the bottom, with the exception of the twenty-two inches in the center here (indicating) it would be the same jack.

Mr. Hanley: We just want to use it to explain to the jury. [32]

Q. Mr. Dudley, what do you call this part of the smoke-jack (indicating)?

A. The smoke pipe or stack part.

The Court: We will call that No. 1 for identification at the present time.

(Testimony of R. J. Dudley.)

Mr. Hanley: Q. What part of the smoke-jack did you call this (indicating)?

A. The stack part.

Q. And this part here (indicating)?

A. The disk or flange.

The Court: Q. What do you call the top?

A. A "T".

Mr. Hanley: Q. And what do you call the lower portion?

A. I would say it was a flange.

Q. And underneath here (indicating), this part, do you know what part that would be?

A. Some protection from the fire.

Q. You don't know what that is termed?

A. No.

Q. Did you ever handle a smoke-jack before?

A. No.

The Court: Q. Did you see them before?

A. Yes, I have seen them on a building or car.

Mr. Hanley: Q. Were any ever shipped before?

A. Not to my recollection.

Q. Now, the smoke-jack that you had in the car, was the pipe part of the smoke-jack about the same dimensions across, I would say about eight inches in diameter, about that? A. Yes. [33]

Q. And this disk here (indicating) that you have described, is that about the width of the disk, about five or six inches, extending out from the stack part? A. Yes.

(Testimony of R. J. Dudley.)

Q. And then this sleeve here (indicating), is that about the same height? A. Yes.

Q. This part the smoke-jack is standing on, is that about the same height from the floor?

A. No.

Q. All right; that jack, what was the height of the bottom?

A. I would say it was about twelve inches or twelve to fifteen inches.

Q. You mean this one was standing up about like that (indicating)? A. Yes.

Q. This disk, the top disk that I am touching here (indicating), was that loose or tight on the pipe? A. It was loose.

Q. How far up would it go, if you know?

A. I would say it was ten or twelve inches higher.

Q. And this big square piece of tin on the base here (indicating), how high was that?

A. About ten or twelve inches from the floor and it was loose too.

Q. Was this also loose? A. Yes.

Q. The edge of this top flange, was that the same as this edge here (indicating)? A. No.

[34]

Q. State what the edge of the flange was?

A. It was straight, flat.

Q. You mean it stuck straight out?

A. Yes.

(Testimony of R. J. Dudley.)

Q. Was the edge of this flange sharp or dull?

A. Very sharp.

Q. When did you get the dimensions description of this smoke-jack that you just described?

A. Shortly after I was injured.

Q. You go ahead and state what happened; you placed this smoke-jack up alongside of the baggage car, then what happened?

The Court: First, before you tell us that, either by picking it up and using the Clerk's desk or over here, indicate how it was lying and what you did with it, describe there what happened to you without hurting yourself again.

Mr. Hanley: Q. The stack part on this jack, how long was this, about; this stack part on the jack?

A. I would say about seven and one-half feet long; the stack was probably five and a half feet long.

Q. And the measurements over all from the "T" at the top to the bottom of the jack was how far? A. About seven and a half feet.

The Court: How tall are you?

A. About five feet eight inches.

The Court: Tell us how it was lying and how you picked it up and what happened to you; just show us with this smoke-jack here?

Mr. Laughon: I might suggest that for the [35] record there ought to be some identification of what counsel is using.

(Testimony of R. J. Dudley.)

Mr. Hanley: Let the record show we are using Exhibit No. 1, which is a smoke-jack, for demonstration purposes.

Mr. Laughon: And that is admitted?

The Court: It has not been offered yet; it is merely for the purpose of illustration. I do not think it is very important to have the exact dimensions. What I want to get before the jury is how the accident happened.

Mr. Hanley: Mr. Dudley, if you will just take this and show to the jury how it laid on the side of the baggage car; first of all, was this disk loose (indicating)? A. Yes.

Q. How loose and how much play did it have?

A. It had all of the play.

Q. What do you mean?

A. It had play for a foot.

Q. Was this bottom piece, disk loose (indicating)? A. Yes.

Q. How much play did it have?

A. It was not so much; it was at an angle, probably forty-five degrees.

Q. This end piece (indicating), how much along there?

A. I would say about ten inches along there.

Q. This part here (indicating)? A. Yes.

The Court: Just tell us what you did with it?

A. There was packages in front of it, and there was packages underneath and around it. I had to

(Testimony of R. J. Dudley.)

move some of those [36] packages, and there was some packages underneath it too. In order to get at the packages I raised it up this way (indicating).

The Court: Did you lean it against the wall?

A. Yes.

Q. You left it there? A. Yes.

Mr. Hanley: Q. How much time elapsed before it fell on you?

A. Probably half a minute.

Q. What were you doing at the time?

A. I was getting these packages out.

Q. Then what happened?

A. It started to move like that (indicating). I thought it was going to move—I am down on the floor getting the packages out from around it—I thought it was moving and put out my arm to stop it and it struck me on the wrist.

Q. Which wrist? A. The left wrist.

Q. Did it cut you? A. Yes.

Q. What part of it cut you?

A. The disk.

Q. How do you know it was the disk?

A. I saw some blood on it.

Q. Did you notice the disk before?

A. No.

Q. Had you made an inspection before you handled it? A. No.

Q. Did you know where it was going? [37]

A. No.

(Testimony of R. J. Dudley.)

Q. How did you find out where it was going?

A. I looked at the tag.

Q. Where was the tag?

A. Tied on the "T" end.

Q. How did you see it was on it?

A. When I raised it up from the floor I saw it and I looked at the tag. I saw the tag up there on the "T" end so I noticed it was going to Spokane.

The Court: At this point we will take a short recess.

Whereupon the Court again admonished the jury to observe the cautions of the Court.

(Short recess)

The Court: Let the record show the jurors are all in the box, all parties present and their counsel.

R. J. DUDLEY,

the plaintiff herein, resuming the stand, testified further as follows:

Direct Examination

(By Mr. Hanley)

Q. Mr. Dudley, were there any other articles besides Company material in the baggage car when you reported for work that [38] you had to take care of? A. Yes.

Q. What was that?

(Testimony of R. J. Dudley.)

A. Laundry bags, linen and mail bags.

Q. When you say mail bags, what do you mean, United States mail?

A. No, Company mail.

Q. Did you have anything to do with Company mail? A. Yes.

Q. Where were these bags located?

A. They were in around the smoke-jack.

Q. How large were they?

A. Probably eighteen inches long and ten inches high.

Q. How many of them? A. Two of them.

Q. Did you have anything to do with the Company mail? A. Yes.

Q. All right, tell the jury what your duty was in connection with that?

A. I have to open these mail bags and sort out all of the mail for all points. Some of it remains here in Tacoma and I have to tie that up and leave it at Tacoma before the train leaves Tacoma; also the mail that goes down on Grays Harbor and the Tacoma Eastern line.

Q. You have to do that before the train leaves Tacoma? A. Oh, yes.

Q. You have how much time to do that in?

A. Thirty minutes.

Q. What did you do with those mail sacks then before you touched the smoke-jack, if you know?

[39]

A. I did not get that.

(Testimony of R. J. Dudley.)

Q. What did you do with those mail sacks before you touched the smoke-jack; did you move them or didn't you? A. Yes.

Q. Where did you move them to?

A. I just moved them in the clear.

Q. When you say "clear", what do you mean?

A. On the floor away from the smoke-jack.

Q. Now, why did you move the smoke-jack?

A. Because there was some material along and around it and underneath it.

Q. Why did you have to move or arrange any of this Company material?

A. Because I had to arrange it in the car so that I knew right where it was and if I had to put it off at a station I could find it right away and would not have to look for it.

Q. Was there any more baggage there available there to be loaded in the car? A. Yes.

Q. How much of it?

A. I could not say how much; there was some on the truck, a truck load.

Q. Where would that baggage be destined to?

A. Whatever comes from Aberdeen and would go to different stations.

Q. Who would that belong to?

A. To some passengers on the train, I presume.

Q. Was it baggage they had checked?

A. Yes.

Q. What was the nature of it? [40]

A. Trunks, grips and suit cases.

(Testimony of R. J. Dudley.)

Q. Who, if anyone, loads that into the baggage car? A. Yes.

Q. I say who, if anyone, loads that into the baggage car?

A. That is the station baggage agent.

Q. They load it into the car and who receives it when it is loaded?

A. That is the train baggage man.

Q. Who is yourself? A. Yes.

Q. What do you do with the train baggage when it comes in?

A. All of the through baggage, that is, Chicago and points East, go in one end of the car.

Q. Is that the end you work in? A. Yes.

Q. When you say "end", is that the extreme end? A. Yes.

Q. Just explain to the jury what you do with it?

A. All of the through baggage goes into the extreme end of the car. What I mean by through, is, Chicago and Eastern points, that is piled in the end of the car, and then local baggage that is not destined that far has to be kept this way so it can be put off at the station to which it belongs.

Q. Did you make any inspection of this smoke-jack before you handled it? A. No.

Q. Why didn't you?

A. I did not have time.

Q. And had you ever shipped any of these smoke-jacks before? [41] A. No.

(Testimony of R. J. Dudley.)

Q. Did you ever handle any in the baggage car?

A. No.

Q. I think you have described that that is not nearly so tall (indicating smoke-jack)?

A. No.

Q. The one you handled was longer?

A. It was quite a bit longer than that.

Q. When the smoke-jack struck your left wrist, I think you testified, did it fall clear over?

A. No.

Q. What happened to it?

A. I just kind of straightened it up.

Q. How big was the cut on your wrist?

A. It was in to the bone.

Q. Was there any blood? A. Yes.

Q. What was the color of the smoke-jack?

A. Kind of a galvanized color, kind of dark gray.

The Court: The regular color of galvanized iron? A. Yes.

Mr. Hanley: Q. How did that compare with the color of the interior of the car?

A. As far as I could tell, about the same.

Q. What was the lighting condition of the car?

A. They were poor.

The Court: They were the same as they had been there, weren't they?

A. Yes, the lights were burning. [42]

Mr. Hanley: Q. To what extent were they burning; were they burning full? A. No.

(Testimony of R. J. Dudley.)

Q. How did you determine that? To what extent were they burning?

A. I would say about, probably about one-third capacity.

Q. What is the difference when you are standing; what are the lights lighted from?

A. They are lighted when the train is standing, they are lighted—current is supplied from a storage battery.

Q. Describe the lighting when the train is running?

A. Underneath the baggage car, and when the train is running the current is supplied by an axel dynamo generator underneath the car.

Q. Is that on each individual car?

A. Yes.

Q. Then, when the train is running, how much brighter is the lights than on this night in question when it was standing at the station?

A. Very much brighter when the train is running.

The Court: The light you had there is the usual light you had there when you are working there, was it? A. Yes.

Mr. Hanley: Q. These lights, you said, were burning about one-third of capacity; now, is that the amount of lighting you always have in the car or were they sometimes brighter?

A. They were brighter sometimes.

(Testimony of R. J. Dudley.)

Q. Is it the usual thing for them to be brighter by the station when you are standing there and they are loading [43] the baggage; they have lights at the station where you are loading the baggage?

A. Yes, certainly.

Q. How much more lighting does that give you right by the door of the baggage car?

A. Probably about—not full at any time but probably, maybe a third more right by the door.

The Court: You saw the packages, you saw what you were moving. You saw the packages and the smoke-jack, you stood it up; you were not in the dark at any time, were you? A. No, sir.

Q. You did not have to grope for anything, did you? A. No, sir.

Q. You knew what the object was?

A. Yes, sir.

Q. You had light enough for that?

A. Yes, sir.

Mr. Hanley: Q. Did you have light enough to read the tag? A. No, sir.

Q. What did you do to read the tag?

A. I raised it up near the lights so I could see where the destination was; where it was going.

Q. You saw the objects, the outlines of the objects themselves, is that correct?

Mr. Laughon: I object to that question as leading. Let the witness state what he saw. I object to counsel's last question as leading.

The Court: Objection sustained. [44]

(Testimony of R. J. Dudley.)

The Court: Q. When you stood it up you saw its contour and you saw the parts that made it up?

A. Yes, sir.

Q. You stood it up because you wanted it out of the way? A. Yes, sir.

Q. That occurred long after you had looked at the tag? A. The accident?

Q. When you stood it up? A. Yes, sir.

Q. Then you went about your work?

A. Yes, sir.

Q. You testified you raised it up; you stood it up, did you? A. Yes, sir.

Q. Then you stooped down to do some other work? A. Yes.

Q. And in about half a minute it fell?

A. Yes.

Q. Getting back to the accident, then, after about half a minute it fell towards you and you put out your left arm to put it to rest, to stop it, and it cut you? A. Yes.

Q. All of this time that this happened you were stooping? A. Yes.

Q. You could see what the object was in front of you? A. Yes.

Mr. Hanley: Q. Now, the tag, I understood from your answer to the Court's questions that you stood the jack up after you read the tag; did you read the tag before you stood it up or did you read the tag at the time you set it up; when did you

(Testimony of R. J. Dudley.)

read the tag as to the [45] destination? When was that?

A. When I raised it up, I raised it off the floor and the "T" had the tag on it and with the "T" near the lights I looked at the tag and then raised it up against the side.

Q. When did you first see the disks?

A. After my arm was cut.

Q. Was there any packages piled over the jack?

A. Yes.

Q. And on top of it? A. Yes.

Q. Before you raised it up? A. Yes.

Q. What did you do with those packages?

A. I just cleared the jack, just took them off the jack and laid them on the floor, back on the floor.

Q. Now, after you were cut, Mr. Dudley, what did you do?

A. I showed the conductor my arm and told him I was cut.

Q. Who was the train conductor?

A. W. S. Johnson.

Q. Was your arm bleeding at that time?

A. Yes.

Q. To what extent?

A. It was bleeding quite freely.

Q. Did you tie it up; was there anything done with it at that time? A. Yes.

Q. Tell the jury what happened from there on?

(Testimony of R. J. Dudley.)

A. The conductor left immediately for the train passengers office to get a man to relieve me. The express man gave me first aid, tied it up, bandaged it up and after he had [46] bandaged it up and looked at the jack, shortly after that the conductor came back and told me I was relieved and then I went to the passenger office and called up the doctor.

Q. Who was the doctor?

A. Dr. Leaverton.

Q. What capacity does he serve with the Railroad?

A. He is the Milwaukee doctor, the Hospital Association doctor.

Q. What do you mean "Hospital Association doctor"?

A. He treats employees that belong to the Milwaukee Hospital Association.

Q. Were you a member of the Milwaukee Hospital Association? A. Yes.

Q. For that, what, if anything, did you pay to the Association?

A. I don't know just exactly; they take it out of our wages. I think it is about \$2.00 a month.

Q. Go ahead and explain to the jury what you did then?

A. I went immediately to Dr. Leaverton's home and he examined my arm and said he would have to sew it. He got his medicine and gut and took

(Testimony of R. J. Dudley.)

some stitches in there, I would not say for sure how many but I think it was three or four, and he told me to wait awhile. I sat down for awhile and it did not want to stop bleeding so he unbandaged it and took, I think, one more stitch in it and told me to remain awhile longer. It did finally stop bleeding and he told me I could go home but to be back in his office the next day. I went home and went to bed. The next morning I got terribly sick, some terrible feeling in my arm was paining me bad and I was taken to the doctor, Dr. Leaverton, who treated me the night before. I am not positive whether he took the stitches out the next morning or the following [47] morning. He put my arm in a hot solution in a tank of some kind for about an hour and a half and then he told me to return the following morning. I did that, return every day, excepting Sunday, for probably, about four weeks; Sundays I had instructions to be treated at home with hot water and some solution. And then he said "we are going to try to get away from putting your arm in this solution and we won't give you that treatment today, but however, you be back tomorrow" and he would paint it with some kind of medicine or salve and bandage it. The arm was draining very freely; he would place a large amount of cotton on my wrist and before I would get home it would be draining out from the bandages. He gave me that treatment for probably a week and

(Testimony of R. J. Dudley.)

told me that he had it stopped draining, but however, he told me to come every other day. It stopped draining about the third day and after it stopped draining I told the Doctor that it was paining me terribly again but he did not comment on it. He told me to be back there the following day or the next day and when I returned I told him that the arm is not right, it is simply paining me terribly. About the following time, probably the next or second day, I told him the same thing, that the arm was not right and that it was paining me terribly.

Q. How many times did you go to this Doctor, the Hospital Association doctor, Dr. Leaverton; how many times did he treat you?

A. I would say probably sixty trips.

Q. And that treatment continued from the time you were injured up until what date, about? [48]

A. Probably sometime in July or August, 1937.

Q. When did you return to work?

A. Along the latter part of February.

Q. That would be the following February, 1937?

A. Yes.

Q. How long did you continue to work?

A. About the eighth or tenth of May.

Q. Of 1937? A. Yes.

Q. What was your condition during the period of time you worked, your physical condition during that period of time?

(Testimony of R. J. Dudley.)

A. I was terribly in pain.

Q. Where did you have the pain?

A. Especially in my right arm and both knees.

Q. At the joints? A. Yes.

Q. Where else?

A. In my back and my left shoulder.

Q. How did you happen to go to work?

A. I was sent to Dr. Bouffeleur who is the Chief Surgeon of the Milwaukee and I asked him to authorize some money or some expenditure to be examined——

Q. Did he advise you to go to work?

A. Dr. Bouffeleur, yes.

Q. He is the Chief Surgeon for the Hospital Association? A. Yes.

Q. You went to work on his advice?

A. Yes.

Q. You worked from February to May 8th?

A. Yes. [49]

Q. How did you perform your work during that period of time? A. Yes.

Q. Did you do your full duties during that period of time? A. Yes.

Q. Did it affect you doing that work?

A. Yes.

Q. In the knees? A. Yes.

Q. Then, why did you quit work on May 8th or 10th, 1937?

A. Because my arm was paining me so bad.

(Testimony of R. J. Dudley.)

Q. Which arm? A. My right arm.

Q. You were cut on the left arm? A. Yes.

Q. Where did you have this pain in the right arm? A. Just above the elbow.

Q. Was it normal all of the time, the external appearance of your arm? A. No.

Q. What was the condition of it?

A. About the first or second trip after I went to work my right ankle and my right thumb started swelling up. I got swelling in my left hand and my knees got so bad I was kind of wobbly on my feet.

Q. Were your knees swollen? A. Yes.

Q. Would they stay swollen all of the time?

A. No.

Q. Would you be better at times than others?

A. Yes. [50]

Q. The pain was where?

A. In my right arm and knees.

Q. Was there any in the left arm?

A. Not at that time.

Q. Any in the back?

A. Later it came in the back.

Q. Now, let me get back, diversifying a little while I have it in mind. Had the Company, prior to the time you were injured, ever shipped any tools in your baggage car? A. Yes.

Q. What kind.

A. Cross-cut saws, axes and adzes.

(Testimony of R. J. Dudley.)

Q. What, if any, protection was placed on the sharp ends of the adzes?

A. They usually had, I think, a burlap wrapping around that.

Q. Would the points be protected?

A. Yes.

Q. In what way?

A. They usually had some protection of some light wood over it.

Q. Would the sharp ends be exposed under any circumstances? A. No.

Q. Did the Company always ship that kind of sharp tools with that protection, all shipments which you had prior to the time of the accident?

A. Yes.

Mr. Laughon: I object to that, your Honor, as immaterial; that is not proof of anything in this case. There is no allegation in the complaint alleging this was a sharp edged tool like a saw or adze. [50]

The Court: I do not think this could be called a sharp edged tool. If the accident had occurred by a man walking against it in the dark the question might arise but I cannot see how the question could arise here where the accident occurred when an attempt was made to stand it up and it fell. Almost any heavy object, if falling from any height and sufficient force, would necessarily cut. There is no showing here that this was a cutting edge.

(Testimony of R. J. Dudley.)

Mr. Hanley: I thought I covered that, your Honor. He has not identified this as being the same edge as an axe or saw at all, but he has testified that this disk extended out and that it was and did constitute a sharp edge and that that was the thing that cut his hand. I would like to turn to the record and have that part of it read to your Honor.

The Court: I think that entire testimony, I will strike out any testimony in regard to the sharp edges of axes, adzes and saws until you show this was as sharp as an axe, adze or saw.

Mr. Hanley: I thought I covered that, your Honor.

The Court: Until it is shown what kind of an edge it was, I will strike that part of the testimony. Ladies and gentlemen of the jury, the testimony concerning the shipping of axes, adzes and saws and protection of the sharp edges will be stricken and you will disregard it as though it had not been given.

Mr. Hanley: Q. This top disk that I am pointing to, will you describe just what that was; first, tell me, when did you first examine that disk? [51]

A. Shortly after it cut me.

Q. What attracted your attention toward it?

A. After I had had first aid I examined the jack and noticed that there was some blood on the disk part of the jack.

Q. Describe what type of edge there was on the disk?

(Testimony of R. J. Dudley.)

A. It was a flat disk and I saw it was a loose disk.

Q. What kind of an edge did it have?

A. It had a very sharp edge.

The Court: What do you mean "a very sharp edge"?

Mr. Hanley: Q. Is there anything here that you could compare it with?

A. It was very sharp; it was so sharp you could cut yourself if you practically touched it.

Q. Was it falling when you came in contact with it?

A. It just started slipping and I put my arm out to keep it from falling on me and it struck me.

The Court: That was made of corrugated iron?

A. Yes.

Mr. Hanley: Q. Have you ever cut corrugated iron with one of those heavy tin snips?

A. Yes.

Q. Cutting cans and things like that?

A. Yes.

Q. When you cut corrugated iron it leaves an edge? A. Yes.

Q. Now, tell us, how would an edge of that type caused by merely cutting the edges compare with the edge that was on that jack; was it the same or had it been chiseled off to a sharp point like the point of a knife? [52]

A. It was not like that; it was flat; it was not as heavy as this (indicating on smoke-jack). It had the raw edge on it.

(Testimony of R. J. Dudley.)

The Court: Q. Take this small pocket knife; this one is flat as though it had been cut off sharp and you see it shows a sharpening of the edge?

A. Yes.

Q. All right; what kind of edge did the disk have?

A. It had a sharp edge like that knife.

The Court: All right; go ahead.

Mr. Hanley: Q. Was there any covering on it at all? A. No.

Q. Now, I will ask the question, were sharp tools ever shipped in your baggage car?

A. Yes.

Mr. Laughon: I object; he answered before I could object, your Honor.

The Court: I am not going to allow any evidence as to any instruments except as to this type. If you desire to submit instructions to the jury with reference to a sharp edge, that something of that character should have been protected, they may be submitted with a proper instruction, but to compare this with an axe, knife or saw is not warranted by the facts because we are dealing with an instrumentality which is entirely different in manufacture and to say any article composed of something like sheet metal or corrugated iron and the comparison both as to size and type and the place where it was is not proper, the more so as the accident did not occur by the person [53] stepping on it but in at-

(Testimony of R. J. Dudley.)

tempting to make it stand up or lean against the wall of the baggage car.

Mr. Hanley: An exception, if the Court please.

The Court: No exceptions are necessary under the new rules. There is only one exception left and that is exceptions to the Court's instructions to the jury.

Mr. Hanley: Q. Was there any covering of any kind on this disk? A. No.

Q. Now, had you received any notice from the Milwaukee or any of its agents or employees of the sharp edge being on this smoke-jack you have just testified about? A. No.

Mr. Laughon: I object to that as immaterial.

The Court: Objection overruled.

Q. Now, after you quit work in May, 1937, will you describe to the jury what your condition has been from that time up to the present time, your physical condition?

A. I went to Dr. Leaverton and complained about my knee and he taped it over tight and told me to be back in a week and then I was treating by Dr. Long.

Q. Who is Dr. Long; what is his initials or full name? A. Dr. L. Dudley Long.

Q. Dr. L. Dudley Long? A. Yes.

Q. Where is he located? A. Seattle.

Q. How frequently did he treat you?

(Testimony of R. J. Dudley.)

A. Probably, sometimes every four or five days, sometimes twice a month and sometimes three or four times a month. [54]

Q. Has Dr. Long been treating you during all of that period of time up to the present time?

A. Yes.

Q. What has been your physical condition?

A. I have been in bed on account of the pain in my spine.

Q. What part of your spine?

A. From here (indicating) down, about half way down.

The Court: Q. From the small of the back?

A. Yes, and in my left shoulder, both arms from my elbows down and both knees.

Mr. Hanley: Q. Do you have pain in them?

A. Yes.

Q. What type of pain, could you describe the degree of pain?

A. Just an aching, an aching pain.

Q. Does it interfere in any way with your sleep? A. Yes.

Q. To what extent?

A. If I rest I sleep very good but if I try to do something, try to exert myself, I do not sleep so good.

Q. Are you able to do any work?

A. No.

Q. Have you done any physical labor since you have left the Railway? A. No.

(Testimony of R. J. Dudley.)

Q. None, Mr. Dudley, did you do, or do you do any work around the house, any chores of any kind? A. No.

Q. Are you able to do any? A. No.

Q. How do you know? [55]

A. Because I have tried several times.

Q. What kind of work would you try?

A. I tried to do some painting and I tried to seed some oats on my place where I was living; I tried to harrow and I tried to continue my turkey farm that I was operating, tried to work on the turkey farm.

The Court: Q. With what result?

A. The result is that I would have—that the pain would get so severe I would have to quit.

The Court: At this time we will take our noon recess. Court will reconvene at Two o'clock.

Whereupon the Court again admonished the jury to observe the cautions of the Court and Court was adjourned to reconvene at Two o'clock P. M., of this date.

(Noon recess) [56]

Afternoon Session

Court reconvened at Two o'clock P. M. of this date pursuant to adjournment.

The Court: Let the record show that all twelve jurors are present and also both parties and their counsel.

R. J. DUDLEY,

the plaintiff herein, heretofore called and sworn, resumed the stand and testified further as follows:

Direct Examination

(By Mr. Hanley)

Q. Mr. Dudley, as a result of the physical condition you have described, did you spend any time in bed? A. Yes.

Q. Tell the jury how much time, approximately; how much time you spent in bed between the time you were injured up to the present time?

A. Possibly about three months with my spine; possibly about five months with my knees and at different times with my arms and knees and spine.

Q. Where were you in bed, at home or the hospital?

A. I spent probably five months at home and at different times two months at 9515 Rainier Avenue in Seattle and I have been in bed at different times, probably a day or two at William Skagen's at Kent and I spent two days in surgery, Cobb Building Surgery in Seattle.

Q. Were you operated on for any ailment or anything since [57] this accident happened to you?

A. Yes.

Q. State briefly what that was and when it was?

A. I think it was August 25, 1939. Dr. Long sent me to Dr. McLemore and Dr. McLemore examined me and sent me back to Dr. Long and Dr. Long sent me to Dr. Marshall in the Cobb Building.

(Testimony of R. J. Dudley.)

Q. Were you operated on? A. Yes.

Q. What was it for?

A. Some kind of an infection, I could not say the name of it; it was some kind of an infection.

Q. What part of your anatomy?

A. The rectal region.

Q. Were you laid up long with that?

A. I was in bed two weeks in the Cobb Building, and I was at 9515 Rainier Avenue two weeks and then the Doctor told me I could go home. I was home five days and then returned to bed at 9515 Rainier Avenue. That was in 1939.

Q. 1938? A. That was last year.

Q. What date?

A. August 25, 1938 I was operated on.

Q. Do you have any pain at the present time?

A. Yes.

Q. Where?

A. In my spine and both of my arms from my elbows down into the wrists and hands.

Q. Is it an ache or sharp pain?

A. Aching from my elbows down and a breaking pain in my spine [58] at different times.

Q. Before you were injured, that would be before October 5, 1936, what was your physical condition? A. It was good.

Q. Were you able to do your work?

A. Yes.

Q. What salary were you earning?

(Testimony of R. J. Dudley.)

A. About \$190.00 a month, I don't know exactly, between that and \$200.00.

Q. If you were capable of working today would you have steady employment? A. Yes.

Q. On the same job? A. Yes.

Q. Does that pay any more today than it did before?

A. Yes, I would not know for sure but I think about \$16.00 a month.

Q. That would be about a seven and a half percent increase over what it was before?

A. Yes, approximately.

Q. When did that increase take effect?

A. Approximately a year and a half ago; I am not positive of the exact date.

Q. Anyway, that is a seven and a half per cent increase from what it was before, approximately?

A. Yes.

Q. At the time you were injured, what was your age? A. Fifty.

Q. That was October, 1936? A. Yes. [59]

Q. Mr. Dudley, were you somewhat confused as to the actual directions your train was standing at the Tacoma Depot? A. Yes.

Q. What are the real directions?

A. I was taking the time card directions?

Q. What is the time card direction?

A. North and south is the time card direction.

Q. Even though the train runs east?

A. Yes.

(Testimony of R. J. Dudley.)

Q. Just what are the real directions that train was standing at the Tacoma Depot?

A. East and west.

Q. East and west? A. Yes.

Mr. Hanley: You may cross examine.

Cross Examination

(By Mr. Laughon)

Q. This was on October 5, 1936 that this accident happened? A. Yes.

Q. You know Mr. Townsend? A. Yes.

Q. What work does Mr. Townsend do?

A. He is express messenger.

Q. Was he in the car with you that night?

A. Yes.

Q. I think you said the express business was over in the other end of the car? [60] A. Yes.

Q. He furnished you some first aid there?

A. Yes.

Q. You have known him quite a while?

A. Yes.

Q. Now, you just answered counsel's question about some operation that you had later on, you say that was on August 25, 1938?

A. I am not absolutely positive but I think it was.

Q. Well, it was around there, about that time?

A. Yes.

(Testimony of R. J. Dudley.)

Q. And at that time and for some time prior to that time who had been your doctor?

A. Dr. Long, L. Dudley Long.

Q. Now, I think you told Mr. Hanley that after the accident happened that the Company doctor or somebody for the Association treated you for the first thirty days or while your hand was healing?

A. Yes.

Q. Who was that doctor?

A. Dr. Leaverton.

Q. Then, after Dr. Leaverton got through treating you, you went to Dr. Long; when did you have Dr. Long?

A. Dr. Long first examined me, I think, on November 10, 1936.

Q. 1936? A. Yes.

Q. And your accident happened on October 5, 1936? A. Yes.

Q. Well then, did he examine you while Dr. Leaverton was treating you? [61] A. Yes.

Q. Then, later on you went to work?

A. Yes.

Q. Tell us when it was you went to work, do you remember what month it was?

A. Do I remember what month it was?

Q. Yes. A. The latter part of February.

Q. That would be February of what year; 1937?

A. 1937.

Q. That would be the February following the October you were hurt? A. Yes.

(Testimony of R. J. Dudley.)

Q. Well, it was some three or four months after the accident happened that you went back to work?

A. Four months.

Q. Now then, when you went back to work again, what position did you fill? The same position you had before?

A. Yes.

Q. And that was baggage man between Tacoma and Spokane?

A. Yes.

Q. That was early in February of 1937?

A. The latter part of February, I think.

Q. Then, you worked how long on that job?

A. About May 8th or 12th.

Q. Well, from February to May?

A. Yes.

Q. From March to May, that would be around three months?

A. About two and a half months.

Q. Then, you worked for two and a half months?

[62]

A. Yes.

Q. Then, the hand where you had that scar or that cut, that was healed up when you went to work?

A. Yes.

Q. Would you mind showing me where it was?

A. (Showing wrist).

Q. Right here (Indicating)?

A. Yes.

Q. That is the place where they put the stitches in?

A. Yes.

Q. That is on your left hand?

A. Yes.

Q. You say that had healed up at the time you went to work?

A. Yes.

(Testimony of R. J. Dudley.)

Q. Now then, it was in May, along about May 8th or 10th that you laid off and did not work any longer? A. Yes.

Q. Then, how long after you laid off, approximately, was it when you had this operation; was it in the same year?

A. About a year and a half later.

Q. You didn't have the operation then until 1938?

A. From May, a year and three months.

Q. That would be May, 1937 that you laid off, then you think it would be August, 1938 that you were operated on? A. Yes.

Q. During that time from the time you laid off, was Dr. Long your same doctor? A. Yes.

Q. He was doctoring you, treating you?

A. Yes. [63]

Q. I suppose you had this operation, submitted to it on his request or suggestion? A. Yes.

Q. What doctor operated on you?

A. Dr. Marshall in the Cobb Building in Seattle.

Q. He is a doctor in Seattle? A. Yes.

Q. That was, you think, in August of 1938; that would be not quite a year now? A. Yes.

Q. Now, do you know what was your trouble that caused you to have that operation?

A. I can't think of the name the Doctor said; thyroid tumor.

Q. I will ask you this question——?

(Testimony of R. J. Dudley.)

A. Dermoid tumor in the rectum.

Q. That was in your rectum? A. Yes.

Q. Near the extremities?

A. I could not say; probably about two and a half or three inches towards the hip; underneath the membrane towards the left hip.

Q. That was a tumor?

A. I could not state just what it was. It was some kind of infection, something like that.

Q. That was paining you? A. No.

Q. There was a secretion from it, or, do you know? A. Yes.

Q. And had been for a while?

A. No, I don't know. [64]

Q. Anyway, your physician, Dr. Long, recommended the operation and performed it—had it performed, rather? A. Yes.

Q. Now, that operation was performed by Mr. Marshall? A. Yes.

Q. Now, after that operation was performed and this thing was removed, you know you got better, don't you?

A. Yes, along in November. I showed improvement in November.

Q. Your limbs and arms gave better motion?

A. In the arms and my knees.

Q. And your back?

A. My back is better at times and at times it is worse.

(Testimony of R. J. Dudley.)

Q. About a week ago, something like that, you were examined by Dr. Nicholson and Dr. Leaverton?
A. Yes.

Q. That was the same Dr. Leaverton that treated you after the injury?
A. Yes.

Q. That examination was in Seattle?

A. Yes.

Q. In that examination, didn't you tell these doctors that since that operation—you told them of the operation and removal of the tumor?

A. Yes.

Q. Didn't you tell them in that examination that since then you felt better, your knees and back felt better?
A. Yes.

Mr. Laughon: That is all.

Mr. Hanley: No further questions.

(Witness excused) [65]

WILLIAM S. JOHNSON

a witness produced by the plaintiff having been first duly sworn, testified as follows:

Direct Examination

(By Mr. Hanley)

Q. Your name please?

A. William S. Johnson.

Q. And your occupation, Mr. Johnson?

A. I have none.

(Testimony of William S. Johnson.)

Q. In October, 1936, what was your occupation?

A. Railway conductor.

Q. Since that time you have retired?

A. Yes.

Q. You were in the employ of——?

A. Chicago, Milwaukee, St. Paul, and Pacific Railroad.

Q. How long were you in the employ of the Chicago, Milwaukee, St. Paul, and Pacific Railroad?

A. Fifty years and six months.

Q. Do you know Mr. Dudley, the plaintiff in this action? A. I do.

Q. How long have you known him?

A. Twenty-five years.

Q. And on the evening of October 5th, I think it was, was he a member of your crew?

A. Yes.

Q. In what capacity?

A. Train baggage-man.

Q. Were you the conductor of train No. 16 that evening? A. Yes, sir.

Q. Who else was in the crew with you? [66]

A. M. T. Smith.

Q. He was one of the brakeman?

A. I think the rear brakeman but I could not tell without referring to my book.

Q. What time was the train due to leave Tacoma? A. 8:00 P. M.

(Testimony of William S. Johnson.)

Q. Did you have on that train any passengers destined beyond the State of Washington?

A. Yes, sir.

Q. Where were they going?

A. To various places between Tacoma and Chicago.

Q. Likewise, did you have any packages on that train addressed out of the State of Washington?

A. Yes.

Q. What time did you report for work, Mr. Johnson? A. I reported a little before 7:30.

Q. Did you see Mr. Dudley about the time he was there, about the time he reported for work?

A. Yes.

Q. He got there about the same time as you?

A. I think he was there about that time or soon after.

Q. On this night in question, was it light or dark when you reported for work?

A. My recollection was that it was dark.

Q. And the train was where?

A. Standing on track No. 1, next to the station.

Q. At Tacoma?

A. Yes, 25th and A Streets, Tacoma.

Q. What are the directions that the train was standing in, East and West or North and South?

[67]

A. East and West approximately.

(Testimony of William S. Johnson.)

Q. The time card gives the directions as North and South?

A. No, it is not, it is East and West approximately.

Q. Did you observe the baggage car about the time or shortly after you reported for work?

A. No, but I know it was there.

Q. Did you see whether or not there was anything in the door of it? A. No.

Q. When did you first go into the baggage car that evening?

A. After Mr. Dudley reported and showed me an injury on his left wrist.

Q. What time was that, about?

A. Shortly after 7:30, I don't know the exact time.

Q. Where were you?

A. I was making reports in the day coach; it was next to the baggage car.

Q. Did Mr. Dudley come back into the car?

A. Yes.

Q. What was the condition of his hand?

A. It was bleeding.

Q. The left hand, you say? A. Yes.

Q. Where was the cut in it?

A. Just back of the wrist bone.

Q. On the little finger side of the left hand?

A. Yes.

Q. Was it bleeding profusely?

(Testimony of William S. Johnson.)

A. Quite a bit.

Q. What was done then, or did you do anything in connection [68] with relieving him from work?

A. Yes, I immediately went in the passenger office to arrange for relief for him.

Q. Was the express messenger there, Mr. Johnson, or do you know?

A. I could not swear to that.

Q. Did you go into the baggage car before you left Tacoma? A. I believe I did.

Q. Did you make an examination, or did you see a smoke-jack lying there? A. Yes.

Q. Did it look like this, Exhibit No. 1, that we have here?

A. No, it didn't; it looked like it was a new one.

Q. Could you give the dimensions of it, about?

A. I don't know, I didn't measure it. My recollection was it was about six feet long and it was made of metal.

Q. Like the one there?

A. Yes, like the one there.

Q. Did you observe any disk on it at all?

A. I did later.

Q. How soon after?

A. Well, after we left Tacoma.

Q. Did you examine the disk?

A. No overly.

Q. Well, did you make a sort of an examination?

A. I looked at it, yes.

(Testimony of William S. Johnson.)

Q. What did you observe in connection with it, whether it was sharp or dull, or did you make that kind of an examination?

A. It was a raw edge of thin metal, that is all I could see.

Q. The disk I am speaking of was somewhat similar to this one? A. Somewhat, yes, sir.

[69]

Q. Was it flat at the time or was it bent like that one? A. I could not say.

Q. The disk, do you know whether it was loose?

A. It was loose on the pipe.

Q. Do you know about how much play it had on the pipe?

A. Just enough so it could slide up and down.

Q. Could you say how far it would slide up and down?

A. I think from the "T" down, I am not sure about that.

Q. Was there a guard piece on the bottom?

A. I think so, yes.

Q. You stated that was loose?

A. That was new metal and quite pliable.

Q. Would it slide up and down?

A. No, I think that was stationary.

Q. The stationary piece, how far up was that from the floor?

A. I could not answer that because I don't know.

Q. Was it up higher than that (indicating on smoke-jack)?

(Testimony of William S. Johnson.)

A. I think it was a little higher than that.

Q. Had you ever seen any of those smoke-jacks shipped before, Mr. Johnson, in the baggage cars?

A. I have not.

Q. When you went in the car was there much company material in the car, packages?

A. There was some, I don't know how much. I didn't check that, I had no occasion to.

Q. Where was the jack standing at the time you looked at it, was it standing up or was it on the floor?

A. When I first went in I don't recall where it was. Afterwards it was laying up out of the way on a pile of laundry so nobody could get accidentally against it. [70]

Q. Did you notice any blood on it?

A. I didn't.

Q. Did you observe the lighting of the baggage car when you first went into it?

A. I am sorry, I didn't.

Q. The lights in the car, do you know how many they have, that is the number?

A. Approximately what Mr. Dudley told you; there is a string along the center of the roof and one along each door.

Q. Did you carry a lantern?

A. Not in the train, no.

Q. You didn't have one with you when you went into the baggage car?

(Testimony of William S. Johnson.)

A. No, but I did later.

Q. That was after the train started?

A. Yes.

Q. Now, Mr. Johnson, is there any difference between the lighting in the baggage car when the train is standing still, before it moves out of Tacoma, and when it is moving?

A. Generally, the best effect is when the train is moving, it is lighter.

Q. Do you know why that is, Mr. Johnson?

A. Well, I think I do.

Q. Why is that?

A. Because you are taking from the storage batteries when you are standing and from the generators while moving.

Q. Is there a generator on each individual car?

A. Yes, sir.

Q. How many lights did you have on the day coaches? A. About forty. [71]

Q. You have plenty of light in the day coaches, they are well lighted? A. Yes, sir.

Q. And in the baggage car there is about the number that Mr. Dudley stated? A. Yes, sir.

The Court: How did the lighting of this baggage car compare with the lighting of the day coaches, if you observed it at all?

A. I didn't, Your Honor. It was not such that called my attention to it.

Q. In other words, you could see around you?

(Testimony of William S. Johnson.)

A. I could see.

Q. From the lights on the ceiling and the lighting on the doors? A. I could see, yes, sir.

Q. Were objects that were in there visible to you? A. All that I looked at, yes.

Mr. Hanley: Q. Are there any reflectors on those lights in the baggage car, Mr. Johnson, if you know?

A. Some of them have and some haven't, I think.

Mr. Hanley: You may cross examine.

Cross Examination

(By Mr. Laughon)

Q. As I understood you, Mr. Johnson, when you went in, either before the train left or after, you looked at this smoke-jack? A. Yes.

Q. Did you look at it twice? [72]

A. I could not swear that I went in there and looked at it before I left; I did afterwards.

Q. It still remained in the baggage car when you went on to Spokane? A. Oh, yes.

Q. You said something about a guard or something around it, I understood you to say it was made out of metal? A. That is my recollection.

Q. This metal you see in this pipe of course, is light, new? A. Yes.

Q. Is that the same color that the smoke-jack was at that time? A. Yes.

Q. It was the same kind of material?

(Testimony of William S. Johnson.)

A. I think so.

Q. And of that same color? A. Yes.

Q. It was real new then? A. Yes.

Q. You have seen lots of smoke-jacks?

A. Yes.

Q. Look at the one which is marked Exhibit No. 1, this one here (indicating), this shows us, of course? A. I should say so.

Q. That is what caused the difference in the color? A. Yes.

Q. The color of the one that went out that night on the road, it would be the same color as this if this pipe was new? A. Yes.

Q. Now, you said that the sleeve around it or whatever it was that was around it was loose on there? [73] A. That is my recollection.

Q. I wish you would look at the edges of this, I would like to have this marked as an Exhibit for cross examination.

The Court: As defendants Exhibit Number 1.

Mr. Laughon: For cross examinations.

The Court: Those rules don't apply any more. You can cross examine and put it in as a defendants' Exhibit and you don't waive your right to make a motion for insufficiency of evidence.

Mr. Laughon: Q. Look at defendants' Exhibit Number 1 which is galvanized pipe, and you look at the edge of it, the metal or tin, and tell the jury whether or not this sleeve that you saw on there

(Testimony of William S. Johnson.)

had the same type of construction and edge that you see on this?

A. My recollection of it was it was just the rough edge of the metal.

Q. Metal of this kind? A. Yes, as I recall.

The Court: Q. Counsel wants to know if it was an edge different than that, was the edge such as caused by cutting it down as to cause it to be corrugated or jagged?

A. I don't think it was milled out; it was the natural edge.

Q. It was not sharpened out like a knife?

A. I think not, just the raw edge.

Mr. Laughon: That is all.

The Court: I forgot to say in conjunction with the last witness, it is my custom to allow any jurors to ask any questions if the spirit moves them. I think quite a number of this jury has served in juries before me [74] this last three or four weeks. If you desire to address any question to any of the witnesses you may do so and if it is an improper question I will tell you so. I never instruct on facts or give my opinion on facts, although I have that right, but I have never done so except in one particular instance. You have to determine the facts and you are free to ask any question to qualify any statement made by the witness if his testimony is not clear in your mind.

Mr. Hanley: No redirect examination.

(Witness excused)

(Testimony of Raymond John Dudley.)

A Juror: Q. I would like to ask Mr. Dudley a question, if I may.

The Court: We will have Mr. Dudley take the stand so you may do so. [75]

RAYMOND JOHN DUDLEY

The plaintiff herein having been recalled, testified further as follows:

Direct Examination

A Juror: Q. At the time of the accident were you wearing gloves? A. No.

A Juror: Q. Would you advise, if a private shipper, if he were shipping that, would it be in that same form? A. I don't think so.

The Juror: Would it be necessary that it be crated? A. I think so.

Mr. Laughon: Q. This material you talked about being in the baggage car, is what you call company material, and this was company material?

A. Yes.

Q. And this was company material which was going from the place where it was made to a point in Spokane? A. Yes.

A Juror: Is it customary for the company to ship that sort of thing in the condition it was being shipped in? A. No.

The Court: That last answer will be stricken because he has testified he does not know that. He testified he had never seen any being *shipping* be-

fore, so he would not be in a position to say whether it was customary or not, so the answer is stricken.

[76]

The Court: If there is no further questions the witness will be excused.

(Witness excused) [77]

L. DUDLEY LONG

A witness produced by the plaintiff having been first duly sworn, testified as follows:

Direct Examination

(By Mr. Hanley)

Q. Your name, please? A. L. Dudley Long.

Q. What is your profession?

A. Physician and Surgeon.

Q. Where, Doctor, were you licensed to practice medicine and surgery, by each state? A. 1909.

Q. By what state? A. In this state.

Q. The State of Washington?

A. Yes, and Illinois too.

Q. You have practiced your profession as a physician and surgeon in the State of Washington here, for the past how many years?

A. Well, thirty years.

Q. What is your address?

A. I live in Seattle.

Q. Where is your office located?

(Testimony of L. Dudley Long.)

A. It is located in the Fourth and Pike Building.

Q. What position, if any, do you hold in the State?

A. I am the medical officer, Medical Director of the Department of Labor and Industries.

Q. That has to do with what law?

A. The law that covers injured workmen. [92]

Q. That is, under the Workmen's Compensation Act?

A. Yes.

Q. You have how many doctors under you?

A. None at present.

Q. You are the only physician, yourself, for this body, or Department?

A. Yes, sir.

Q. Have you frequently examined injury claims?

A. I examine a great many.

Q. How many would you say you examine in a months time, doctor, could you approximate it?

A. Oh, anywheres between fifty and maybe a hundred.

Q. Each month?

A. Yes.

Q. Do they have all of the various kinds of injuries?

A. I see every type and the result of every type of injury that takes place in this State.

Q. You have been examining for the Department for how many years, about?

A. Since 1933.

Q. Since 1933?

A. Yes.

Q. Does that take up a large part of your time?

A. Yes, it does.

(Testimony of L. Dudley Long.)

Q. In fact, did you just come from Olympia now? A. Yes, sir.

Q. You were over there now with the department? A. Yes.

Q. Do you know the plaintiff, Mr. Dudley?

A. I do. [93]

Q. Have you ever treated him as a physician?

A. Yes, sir.

Q. When did he first come to you, doctor?

A. November 10, 1936.

Q. Did you examine him at that time?

A. I did.

Q. Would you just state to the jury what your physical examination disclosed?

A. Well, he had an infected wound on the outer side of the left wrist right here at the end of the Ulna (indicating) and there was a crust on it. He gave me the history that on October 5, 1936, he had cut this wrist on a piece of tin while he was working and it became infected and that it kept healing up and breaking out again and kept draining. It healed up and he became very upset about it because it kept healing up and breaking out again. I didn't understand why he came to me for advice because he was a railroad employee but, I gave him the advice that he was to continue with his treatment.

Q. Did he tell you at that time who was doctoring him?

A. I understood, the railroad doctors, but I didn't ask who they were.

(Testimony of L. Dudley Long.)

Q. It was railroad doctors, anyway?

A. Yes, sir.

Q. Now, did you make a general physical examination?

A. No, I didn't. I didn't think much of it at that time and simply gave him that advice. I just happened to make a notation on it that he came to see me.

Q. Could you determine, or did you determine, when you examined him at that time, the nature of the infection? [94]

A. No, it had a crust on it at the time I saw him.

Q. What ordinarily causes an infection?

A. An infection of some germ, the staphylococcus or streptococcus, that is one that is more virulent. An ordinary wound such as this, is usually caused by the staphylococcus.

Q. Did you make any slides or microscopic examination of the infection? A. No.

Q. Did you say the staphylococcus is more virulent?

A. I said the streptococcus form is more virulent.

The Court: Q. You could not tell which it was?

A. No.

Q. Doesn't the virulent spread rapidly?

A. Yes, that is true.

Q. And involves a large area?

A. Yes, the staphylococcus has slow action.

(Testimony of L. Dudley Long.)

Mr. Hanley: Q. When did you see Mr. Dudley again?

A. I didn't see him again until 2/15/37.

Q. Did he come to you for professional treatment at that time? A. Yes, he did.

Q. What did you do for him?

A. He told me that the wrist, after he had seen me the first time, opened and drained about two weeks quite freely after it had been closed up, and after that he felt much better. Then, he began to have pain in his right arm just above the elbow, in here (indicating) and his examination showed that the head of the bone was tender to pressure when you squeezed it, and also that the inner side of his [95] right knee was hurting him and the knee was tender; but there was nothing definite to be seen with either of his elbows so far as the coronary process was concerned by the eye. It was tender to pressure and if you flexed the arm actually it hurt him. The knee actually hurt him past the usual range of motion.

Q. What did you do for him?

A. I gave him medicine, salicin, a remedy we use in rheumatism and arthritis. At that same time his knee would pop if you flexed it, there was a pop in his knee.

Q. When was the next time you saw him?

A. The next time was 3/29/37.

Q. March 29, 1937?

(Testimony of L. Dudley Long.)

A. Yes, sir; and he said he had gone to work four, five or six weeks but his knees were giving him trouble. I think he was handling packages or mail bags or something like that and the jolting of the train hurt his knees and it made his right arm and his elbow ache, in the handling of these bags. He was complaining at that time, that the condition seemed to be increasing and getting worse and he had a spell of nausea at times, sick at his stomach at times. I prescribed for him, at that time, I gave him a tonic and some medicine to combat the pains in his knees.

Q. Did you examine the parts he complained of at that time? A. Yes.

Q. Were they tender to touch?

A. Yes, the same as before.

Q. And the next time you saw him again was when?

A. I examined him 4/16/37. I made no notes especially on it except that he feels the same, that there was no change [96] in his condition and we continued the treatment we was using on him?

Q. Doctor, the records you are testifying from, were those kept by yourself? A. Yes, sir.

Q. Go down the line on it and explain to the jury the times you saw him and what you did for him, go through the whole list?

The Court: If the usual routine was followed that he began treating him with, I don't think you

(Testimony of L. Dudley Long.)

need to tell the treatment each time, just tell us on the whole, how often you saw him and then if you had more than one routine of treatment, tell us what the other treatment was?

A. Well, on 5/17/39, he gave the history that the left wrist began swelling up and paining considerably and I prescribed for him again at that time. His knees and elbow were the same and while we continued along about that line of treatment, I have seen him only, in all, I think, about fifty-five or six times.

Q. When was the last time you saw him, doctor?

A. Well, I saw him again the 25th and 27th of this last July and today is the second time this month.

Q. You saw him just a few days ago?

A. Yes.

Q. Go ahead.

A. On 8/17/37, he gave the symptoms of pain in his spine and in his neck and his whole spine would pop and crack on various bendings and various motions and this went down into his pelvis and knees.

Q. Was that verified by objective symptoms?

[97]

A. Yes, you could hear this pop in his hips and knees and at this time I noticed on each side of his kneecap a little bit of swelling and redness. There was a little bit of fluid that had come into his knees and it was tender to pressure on the heads of the bones and on the side. Any pressure hurt his knees.

(Testimony of L. Dudley Long.)

I put him on salicin and that is a drug we use in arthritis. We continued along that way and he improved a little at times but, at other times he was worse and along about—later, well, I don't say he exactly cried but he began to feel that he was not going to recover from his condition at all. He became very discouraged and disappointed and he would cry while explaining his condition and I felt that I would like to have him examined by some other physician. On 8/2/38, I sent him to Doctor McLemore in Seattle. He is an orthopedic surgeon and used to handling these types of cases, and on 8/5/38, I talked to Doctor McLemore and we talked his condition over.

Q. Did you examine him just previous to that time, doctor? A. Yes, sir.

Q. Go ahead.

A. And the doctor recommended some treatments of some tissue extract, we call it a vitamin B extract, that is used in run down conditions and arthritic conditions, and he recommended that we put him on some kind of cod liver oil to build him up. And Doctor McLemore in his examination examined the rectum and found a little tumor just inside of the rectum on the left side. I thought it might be an abscess when he called my attention to it but I examined him again and it felt too hard to be an abscess so I thought [98] I would send him to some specialist. He went to Doctor George Marshall who is a rectal specialist and he said it was a

(Testimony of L. Dudley Long.)

little tumor and that it should come out. He said it was infected and it was draining and so, on August, I believe it was 8/25/39, Doctor Marshall removed this tumor. He said it was a Dermoid Cyst. A dermoid cyst is a little tumor that comes, probably he was born with the condition and something irritated it and it broke down and began to drain. This dermoid cyst is a peculiar type of tumor in that it contains hair and some of them will contain bone and some even teeth. And when a dermoid cyst begins to drain and is infected it has an effect upon the whole system and caused Mr. Dudley to be worse. For this was open for a considerable length of time but two months after that was removed, he began to feel better, that is, his knees felt better and his wrist felt better. Then we continued on the arthritic treatment and we have continued so up to the present time. He gets up to a certain stage where he is just so good, where he is quiet, he gets along fairly well that way but, if he begins to do anything he gets worse so, I felt he has a form of atrophic arthritis.

Q. Could you say, in your opinion, what that is caused from?

A. I believe it was as a result of this infection that came in his wrist.

Q. That is what you saw when he first called on you?

A. Yes, sir.

Q. What would you say, in your opinion, as to whether or not his condition is permanent?

(Testimony of L. Dudley Long.)

A. The condition is more hopeful than it has been in the past. [99] We used to feel these conditions were never cured but under recent treatment in the past five years the prospect is much better of making this man have a comfortable life; in some conditions they are incurable but in some conditions we cured them.

Q. Would you say his condition is temporary or permanent?

A. In my opinion, I believe it is permanent.

Q. When did you examine him last??

A. July 25th and 27th.

Q. 1939? A. Yes, sir.

Q. On this last examination what would you say as to whether or not he has any physical ability to perform any active work of any kind?

A. He is unable to do any manual labor at all. He can do something like washing dishes, he could run an elevator with a lever to it and he could do a watchman's work if he didn't have to walk around too much.

Q. Could he do any work that required the activity of his body? A. I don't think so.

Q. Have you, or from your examination and from your information, do you have any opinion as to what caused that dermoid cyst?

A. That is a thing that is not caused, it was already there.

Q. But, it was infected, you say?

(Testimony of L. Dudley Long.)

A. That is what Doctor Marshall said, I could not say.

Q. You didn't discover that?

A. No, I didn't know he had it until my attention was called to it.

The Court: It was a general condition?

A. That is right. [100]

Mr. Hanley: You may cross examine.

Cross Examination

(By Mr. Laughon)

Q. You made your first examination, doctor, on November 10, 1936? A. That is right.

Q. That was the first time you had seen Mr. Dudley?

A. I had known him for about ten years.

Q. That is the first time you examined him?

A. Yes, that is right.

Q. During the time you knew him before, you had made no physical examination of his condition?

A. No, sir.

Q. At that time, on November 10, 1936, you saw this place on his hand?

A. On his wrist, yes.

Q. He told you, or you knew that that came from, or that that condition on his wrist was the result of an injury on October 5, 1936?

A. October 5, he said.

Q. Then, you examined him the first time on November 10? A. Yes, sir.

(Testimony of L. Dudley Long.)

Q. That would be a little over a month from the time of the injury? A. Yes, sir.

Q. Was it infected there at that time?

A. Yes, there was a crust.

Q. Did the infection at that time, seem to be local?

A. The infection seemed to be local, yes. [101]

Q. That was November, 1936?

A. That is right.

Q. And then, you examined him again in February, 1937? A. Yes, sir.

Q. Did you make any examination during that time of a, have him X-rayed for arthritis?

A. I took one picture on 5/23/38, that was the knees.

Q. On May 23, 1938? A. Yes, sir.

Q. You took an X-ray photograph at that time?

A. Yes, sir.

Q. Did you take any X-rays of anything else except that knee? A. No.

Q. Was that the right or left knee?

A. Both knees.

Q. Both knees? A. Yes.

Q. There was no examination or pictures taken of the arms or any of the parts?

A. No, sir.

Q. Now, you made further examinations at different times? A. Yes, sir.

Q. When did you discover or when was it discovered that there was a dermoid tumor?

(Testimony of L. Dudley Long.)

A. That is when Doctor McLemore examined him.

Q. That was in the month of—about what time of year? What day? A. That was in 1938.

Q. November 4, was when you took those X-rays?

A. Yes, that was about the same time. Doctor McLemore examined [102] him on 8/3/38.

Q. August 3, 1938 was when you called in this other doctor? A. Yes.

Q. Who did you say that was?

A. Doctor McLemore.

Q. At that time, you had under consideration, did you, this question of this dermoid tumor?

A. I discussed it after he found it; I didn't know it was there.

Q. He found it?

A. Yes, and I examined it later.

Q. You made an examination of this tumor at this time? A. Yes.

Q. Where was it located?

A. On the left side, just inside of the rectum.

Q. Pretty well down? A. Yes.

Q. Just where was it?

A. About, at least an inch of the sphincter muscle.

Q. That was apparent there at that time?

A. Yes.

Q. Did he carry an infection at that time?

A. Doctor Marshall said it was infected.

Q. Doctor Marshall, was he there at the time you made this examination?

A. No, I sent him to him.

Q. When was the examination made by Doctor Marshall, after you made the examination or, I believe you said that the other doctor found it in his examination?

A. Well, it was after Doctor McLemore examined that I sent him to Doctor Marshall; I don't know just that exact date. [103]

Q. You examined him and then, you concluded you had better send him to Doctor Marshall?

A. Yes, I examined him and then sent him to Doctor Marshall.

Q. You sent him to Doctor Marshall, I understood you to testify, because he was somewhat of a specialist with these tumors?

A. Of rectal conditions, yes.

Q. And he went there shortly after that?

A. Yes.

Q. You knew there was an operation performed?

A. Yes.

Q. Were you there at the time it was performed?

A. No, sir.

Q. Do you know the result of the operation?

A. Yes, sir, I examined him after the tumor was removed.

Q. From that examination, could you tell us anything, give us any opinion as to how long that tumor had existed?

(Testimony of L. Dudley Long.)

A. I could give you no information at all on that, it was probably there ever since he was born.

The Court: The Doctor said it was congenital.

A. Congenital, yes, sir; in other words, the same as a hereditary infectious disease.

Mr. Laughon: Q. Now, what was in this dermoid tumor when you examined it, what did you find it to contain?

A. Doctor Marshall removed it and called me up and told me what it was.

Q. You made an examination afterwards, didn't you say?

A. I didn't see it after it was removed.

Q. Then the only information of what it contained was what Doctor Marshall told you?

A. Yes, sir. [104]

The Court: He said generally they may contain anything, hair, bone, or teeth.

Mr. Laughon: I didn't understand, he testified that the Doctor told him what it contained.

The Witness: No, he told me it was a dermoid cyst, that is all he told me.

Mr. Laughon: Q. Well, Doctor, from your examination, and your examination of the patient there, would you say that it is possible or likely that this dermoid tumor might have caused or assisted in the poisoning of the plaintiff?

A. If it broke down after it began to drain it would be one of the causes.

Q. When did it began to drain?

(Testimony of L. Dudley Long.)

A. That is what I don't know.

Q. Was it draining at the time you made your examination?

A. I could not see if it was draining, I could not see any but Doctor Marshall said that it was.

Q. What instruments did you use in examining him?

A. Proctoscopes, I have two of them and I used both on him in examining him.

Q. Well, if the tumor was draining would it cause general infection?

A. It would cause, might cause some systemic condition through absorptions from it, yes.

Q. That would be what we call an infection?

A. Infection, yes.

Q. That, of course, would affect the whole system? A. Yes.

Q. And affect the blood and so forth? [105]

A. Yes.

The Court. Assuming that cyst existed and had been discovered at about the time of this injury and infection followed it, would it be possible for you, in the light of the history which you have, to determine which of the two causes might result in the systemic condition that you described?

A. I can state my opinion in the matter, Your Honor.

The Court: Q. All right, state your opinion.

A. I believe it came from his wrist; I don't believe that the tumor in the rectum broke down until some months later.

(Testimony of L. Dudley Long.)

Mr. Laughon: Q. As I understand, Doctor, from the time that the tumor broke down, to use that construction, when it did break down and began to drain, from that time on was that condition caused by that tumor?

A. What condition?

The Court: His lack of vitality.

A. That infected tumor might have added somewhat to his condition.

Mr. Laughon: Q. You have examined him several times since then, when is the last time you have examined him?

A. On the 27th of July.

Q. Of this year? A. Yes.

Q. July, of this year? A. Yes.

Q. Well, the condition you found to exist there, what would you say, doctor, as to whether or not that condition that you found existed could have been caused by this tumor [106] after it broke down? A. Not entirely, no.

Q. It could have simply aggravated a condition he already had?

The Court: Making it a contributing cause, doctor, is that right?

A. A contributing cause, yes, sir.

Mr. Laughon: Q. In your later examinations, is it not a fact, doctor, that you found he has improved since the operation?

A. He has made some improvement.

(Testimony of L. Dudley Long.)

Q. In other words, he is better?

A. He is better, yes.

Q. He has a reasonable chance to continue to improve, don't you think?

A. That is a doubtful question and that is a question that is hard to answer; he may and then again he may not.

Q. The fact that he has improved would tend to show that he would continue to improve, wouldn't it?

A. He has improved up to a certain point but, whereas, if he tried to do any laborious work, strenuous work, he would be right back where he was before.

Q. You think he has a case of arthritis, doctor?

A. Yes.

Q. Well, arthritis is not at all uncommon?

A. It very, very common.

Q. And all of us more or less have arthritis?

A. Yes, we do.

The Court: Q. After a certain age, I suppose.

A. Yes, your Honor, that is right.

Mr. Laughon: Q. It is something you can [107] recover from and go ahead and do your work?

A. A great many can go ahead and do their work and don't know they have it but there are days when something goes wrong and then it develops to a greater extent.

Q. That does not result in permanent disability, does it? A. I will say that it does.

Mr. Laughon: That is all.

(Testimony of L. Dudley Long.)

Redirect Examination

(By Mr. Hanley)

Q. Doctor Long, you took X-rays of this plaintiff's knees on 5/23/38, you say?

A. On 5/23/38, yes.

Q. Did the plates show any bony malformation?

A. Yes, it shows bony malformation and it shows arthritis in the knee.

The Court: By a deposit?

A. It shows what we call splints of bone, you can see them there (indicating on X-ray), these two sharp things sticking up on the end of the tibia on the knee, they are very sharp. On the right one you can see a little bony growth out on the edge of it; that is always indicative of arthritis.

The Court: Q. Do both plates show the same thing, doctor?

A. Yes, your Honor.

Mr. Hanley: We will offer them in evidence.

The Court: They may be received as one exhibit. [108]

Mr. Laughon: I make a motion to dismiss the action brought by the plaintiff upon the ground, first, that the plaintiff has failed to show actionable negligence against the defendants or any of them that was or could be the proximate cause of the injury to the plaintiff, if any; the motion is based on the further ground, that it appears from

(Testimony of L. Dudley Long.)

the testimony of the plaintiff, uncontroverted in the case and indisputed, that the injury, if any, that the plaintiff received, was due to the risks and dangers [122] incidental to his employment at that time, which were open and apparent, which were known and appreciated by the plaintiff or could have been known at the time of the injury. Now, I make the motion on the further ground, that under the evidence of this particular case, the plaintiff's acts, what he did with reference to this smoke-jack, was the sole and proximate cause of any injury received. [123]

COURT'S DECISION

The Court: Gentlemen, I have allowed extensive arguments because I felt that, irrespective of the conclusion that I reach in this matter, a discussion of the problems of law involved would help clarify to the Court the position of the parties, so that even though the motion be denied, the Court would have the benefit of that as a guide in instructing the jury. I think the disagreement between counsel can be outlined in this manner, the difficulty results not so much from what the law is, but from the application of the law to the particular facts. As I had occasion to say yesterday, that the principle of proximate cause is well known and the principle is recognized as ultimately the question of what the proximate cause was for the

jury to determine. Contributory negligence is out of the case because of the Employer's Liability Act, I think it is Section 53 of Title 45. * * * (Citing cases). [124] The facts clearly show, whether you approach them from the standpoint of proximate cause, that the proximate cause of the injury was not anything that the defendant did. The defendant placed this object in the car but it was there in full view. While it is true it was possibly dim, it is evident that there was ten twenty-five watt lights in the center of the car and for a man working near the door at 7:30 o'clock in the afternoon, they provided light enough to see the objects there, he could distinguish them there. He saw the jack, and said it was made of corrugated iron. He saw under it and above it and around it where there was other objects that he had to handle in performing his duty. He was there for the purpose of arranging the car and started out arranging the car to suit himself. Had this jack been set up by the company and had he, while removing one of the sacks, caused it to fall and came into contact with it, it might have presented the question to the jury as to whether placing it in that position where it might fall didn't present a question of fact. Now, repeatedly we have cases of negligence involving falling objects and in these cases it is held that where the object was placed by the employer in a position where it might fall and it did actually fall and someone has an injury, invitee or em-

ployee, the question then is one for the jury. But, in this particular case the object was placed by the employer in a position where it didn't cause the injury, where it could not cause the injury unless he stumbled against it, assuming that it had a raw edge. In arranging his objects to suit himself, it is true it was his duty to pick up the objects, but he was under no compulsion to arrange them in any [125] particular manner. The baggage had not come yet; there was no one in front asking for the baggage truck and no one hurrying him about his work. He had reported for duty and went in there to arrange his place for work. He saw these objects and proceeded with the arrangement of them in a manner to suit himself. Had something happened, had the steel strapping on the end of those boxes caused the sharp edge to come into contact with his hand, then the question of negligence would become factual, but I don't remember anything of that sort happening in this case. He picked up the package and held it over to the light to read the small label attached to it and saw it was destined for Spokane. Immediately he proceeded to put it back and arrange it in a manner he thought was a proper manner and arranged it against the wall in a standing position and then stooped and proceeded to work on the packages near and about it and it fell. Now, we don't know why it fell; many causes might have intervened; it might have been that he pulled something from in

back of it or placed something right under the stack or that it may have been he placed it insecurely against the wall; in other words, we have any one of three or four causes that might have caused it. And there is no cause that is traceable to the employer but, even if we assume that the presence of this sharp instrument may have been the cause, we have several other causes and, under the authorities of these two cases, a jury would have to speculate, as to which cause was the proximate cause of the injury, but I will go further and say, if the sole cause of the injury was, as alleged in the complaint, the coming in contact of the plaintiff's wrist with this smoke-jack and that occurred after the plaintiff had placed it in a position, and the only position, in which [126] it could fall and hurt him, that that was the proximate cause of the injury. I would go further and say, if it were the case of an axe, if we assume he had an axe with a sharp edge, placed there unprotected, that if in placing it out of the way he had suspended it on a nail and it had fallen off and damaged him, there could be no recovery. Yesterday, I referred to a situation where we assumed that in placing several objects or packages he had placed them on top of each other and the top one had fallen off and the top one was found to contain heavy matter or some liquid that might be injurious to the human body, there could be no claim when the act of the employee, in arranging the material, caused that to

come into contact with his body. There is no act traceable to the employer when the employer placed upon the premises an object which might have caused the injury under other circumstances, that is, if it had been allowed to remain as it was, but, in fact it was not, the cause being the act of the employee in arranging the material.

I do not think that the presence of an object of this character, large and visible, which merely has a raw edge resulting from the ordinary cutting of corrugated iron, can be called a dangerous object so as to bring the case within the Squib case. For one thing the situation is so entirely different that it would require stretching our imaginations between this situation and the situation where one puts into motion a series of events which is responsible for the injury. There must be a violation of duty and the doing of a thing which results in the injury. Here the placing of the jack in the car could not by any stretch of the imagination have been the proximate cause of the injury. [127] It was his act in putting it up in a position where it would fall on him. It might be conceived that if a dangerous object were placed in a place of work and the employee, in order to protect himself, moved it to a place adjacent which proved to be just as hazardous as the one originally existing, we might claim a continuity of events, but here there is no continuity whatsoever. The entire continuity was broken. If he had set it up in a safe

way he could not have been hurt. Here it was the quick force of his arm against the falling object that caused the injury, and we do not know which of the many causes caused it to fall and not one of them is traceable to the original placing of the object by the defendant.

It is always disagreeable for Courts to have to determine that a person who evidently was injured is without remedy but we cannot create liability where the law says it does not exist and the law having said that the liability of even an employer is based on fault only, and where it affirmatively appears that it is not at fault, the fault being solely that of the employee, it becomes the duty of the Court to disregard the sympathy it might have for a person, and determine the matter strictly according to the dictates of the law, because ultimately the meaning of the rule of law which is the fundamental of our judicial system, is that it is binding upon the Courts as well. Courts cannot disregard the principles of law which are established by the Congress or the Legislative Body and interpreted by the Court and which limit liability to the circumstances of certain facts only.

The defendant's motion to dismiss will be granted and the case will be dismissed. [128]

Mr. Hanley: May I automatically be granted an exception under the Court's ruling?

The Court: Yes. Call in the jury.

[Copy Endorsed]: Filed Nov. 29, 1939. [129]

CERTIFICATE OF CLERK,
U. S. DISTRICT COURT

United States of America,
Western District of Washington,
Southern Division—ss.

I, Elmer Dover, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing Transcript of Record, consisting of pages numbered 1 to 134 inclusive, is a full, true and correct copy of so much of the record, papers and proceedings in the case of R. J. Dudley, Plaintiff and Appellant, vs. Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation, and Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation, Defendants and Appellees, numbered 8594 in the District Court of the United States for the Western District of Washington, Southern Division, as required by Appellant's Designation of Contents of Record on Appeal on file and of record in my office at Tacoma, Washington, and the same constitutes the Transcript of the Record on Appeal from the Judgment of Dismissal and ruling of said District Court of the United States for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the following is a full, true and correct statement of all expenses, fees and charges earned by me in the preparation and certifi-

cation of the aforesaid Transcript of Record on Appeal, to-wit:

Appeal fee	\$ 5.00
Clerk's fees for comparing transcript, 226 folios @ 05¢ per folio.....	11.30
Clerk's Certificate50
	<hr/>
	\$16.80
	[133]

I do further certify that the Clerk's fees in the above itemized amount have been paid in full by the attorneys for Plaintiff and Appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court, in the City of Tacoma, in the Western District of Washington, this 11th day of December, 1939.

[Seal] ELMER DOVER,
 Clerk,
By E. REDMAYNE,
 Deputy. [134]

[Endorsed]: No. 9392. United States Circuit Court of Appeals for the Ninth Circuit. R. J. Dudley, Appellant, vs. Henry A. Scandrett, Walter J. Cummings, and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, and Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, Appellees. Transcript of Record. Upon Ap-

peal from the District Court of the United States for the Western District of Washington, Southern Division.

Filed December 13, 1939.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 9392

R. J. DUDLEY,

Appellant,

vs.

HENRY A. SCANDRETT, WALTER J. CUM-
MINGS, and GEORGE I. HAIGHT, Trustees
of Chicago, Milwaukee, St. Paul and Pacific
Railroad Company, a corporation, and Chicago,
Milwaukee, St. Paul and Pacific Railroad Com-
pany, a corporation,

Appellees.

APPELLANT'S STATEMENT OF POINTS
ON APPEAL

Appellant states the following points on which
he intends to rely on appeal:

I.

Error of the trial court, duly excepted to by
plaintiff, granting defendants' motion to dismiss

action and entering judgment thereon, as under the testimony the cause should have been submitted to the jury to determine as questions of fact, for the following reasons: (a) there was evidence of actionable negligence against the defendants that was the proximate cause of the injury to plaintiff; (b) that plaintiff did not assume the risk of his injury as a matter of law.

II.

Error of the trial court in striking and refusing to admit in evidence the following testimony:

Q. Had the Company, prior to the time you were injured, ever shipped any tools in your baggage car? A. Yes.

Q. What kind.

A. Cross-cut saws, axes and adzes.

Q. What, if any, protection was placed on the sharp ends of the adzes?

A. They usually had, I think a burlap wrapping around that.

Q. Would the points be protected?

A. Yes.

Q. In what way?

A. They usually had some protection of some small light wood over it.

Q. Did the Company always ship that kind of sharp tools with that protection, all shipments which you had prior to the time of the accident? A. Yes.

Mr. Laughon: I object to that, Your Honor, as immaterial; that is not proof of anything in

this case. There is no allegation in the complaint alleging this was a sharp edged tool like a saw or adze. * * *

The Court: I think that entire testimony, I will strike out any testimony in regard to the sharp edges of axes, adzes and saws until you show this was as sharp as an axe, adze or saw. * * *

The Court: Q. Take this small pocket knife; this one is flat as though it had been cut off sharp and you see it shows a sharpening of the edge? A. Yes.

Q. All right; what kind of edge did the disk have?

A. It had a sharp edge like that knife.

The Court: All right; go ahead.

Mr. Hanley: Q. Was there any covering on it at all? A. No.

Q. Now, I will ask the question, were sharp tools ever shipped in your baggage car?

A. Yes.

Mr. Laughon: I object; he answered before I could object, Your Honor.

The Court: I am not going to allow any evidence as to any instruments except as to this type. * * *

Mr. Hanley: An exception, if the Court please.

FRANK C. HANLEY

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Due service of the within Appellant's Statement of Points on Appeal is hereby accepted by certified copy, this 23rd day of December, 1939.

A. J. LAUGHON

Of Attorneys for defendants-appellees

[Endorsed]: Filed Dec. 28, 1939. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF PARTS
OF RECORD FOR CONSIDERATION ON
APPEAL

Comes now the Appellant and hereby designates parts of the record which he thinks necessary for consideration on appeal, to-wit:

1. Complaint—pages 1-5 Certified Transcript on Appeal.
2. Answer—pages 6-10 Certified Transcript on Appeal.
3. Judgment of Dismissal—pages 13-14 Certified Transcript on Appeal.
4. Notice of Appeal with date of filing—pages 15 Certified Transcript on Appeal.
5. Entire testimony of the plaintiff, R. J. Dudley—pages 7 to 50 inclusive and pages 61 and 62 Transcript of Evidence of the Court Reporter, denominated "Statement of Facts"—pages 22-65, 76-77 Certified Transcript on Appeal.
6. Entire testimony of the witness, William S. Johnson—pages 51 to 60 inclusive Transcript of

Evidence of the Court Reporter. denominated "Statement of Facts"—pages 66-75 Certified Transcript on Appeal.

7. Entire testimony of the witness, L. Dudley Long—pages 77 to 93 inclusive Transcript of Evidence of the Court Reporter, denominated "Statement of Facts"—pages 92-108 Certified Transcript on Appeal.

8. That part of the Transcript of Evidence of the Court Reporter, denominated "Statement of Facts" beginning with line 22 on page 107 thereof and ending with line 7 on page 108 thereof, the same being motion of counsel to dismiss the action—pages 122-123 Certified Transcript on Appeal.

9. The Court's decision on motion to dismiss and exception thereto, beginning with line 15 on page 109 of the Transcript of Evidence of the Court Reporter, denominated "Statement of Facts" and ending with line 3 on page 114 thereof.—pages 124-129 Certified Transcript on Appeal.

10. Appellant's Statement of Points on Appeal.

11. Appellant's Designation of Parts of Record for Consideration on Appeal.

FRANK C. HANLEY

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407 Yeon Building

Portland, Oregon

Due service of the within Appellant's Designation of Parts of Record for Consideration on Ap-

peal is hereby accepted by certified copy, this 23rd day of December, 1939.

A. J. LAUGHON

Of attorneys for Appellees.

[Endorsed]: Filed Dec. 28, 1939. Paul P. O'Brien, Clerk.

